

DCHUBALF

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

12 CR 196 (PAC)

5 MICHAEL BALBOA,

6 Defendant.

7 -----x

8 New York, N.Y.  
9 December 17, 2013  
9:00 a.m.

10 Before:

11 HON. PAUL A. CROTTY

12 District Judge  
13 and a Jury

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
Southern District of New York

17 JASON H. COWLEY

WILLIAM T. CONWAY III

18 DAVID I. MILLER

Assistant United States Attorneys

19 TACOPINA SEIGEL & TURANO, PC

20 Attorneys for Defendant

21 JOSEPH TACOPINA

22 CHAD D. SEIGEL

JOSHUA E. DUBIN

DINA NESHEIWAT

JASON LAMPERT

23 KEVIN SCHNEIDER

24 ALSO PRESENT

Spencer Hattendorf, Paralegal

25 United States Attorney's Office

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(In open court, jury not present).

THE COURT: The jury is here, so call in the jury.

MR. COWLEY: Your Honor, there is a transcript disagreement that I understand might arise, something that I wanted to flag and I understand they will be putting the quote on a slide and we think there is a substantial typo that changes the meaning of what a witness said.

THE COURT: What does the transcript say?

MR. COWLEY: It is on page 1070, and it is during Dr. Muhtar's cross-examination.

THE COURT: His most recent cross-examination?

MR. COWLEY: No, I think the first time around, and I will start with line 13 for context and then show you where the issue is. So on 13:

"Q You would agree, sir, that this document doesn't say what is going to happen to the warrant itself. I think you testified on direct that the warrant, you word was extinguishes upon maturity, correct?

"A Yes.

"Q That language doesn't appear in this document, doe it?

"A Well --

"Q I am just asking you, yes or no, if the language appears in the document?

"A Extinguishes doesn't but I believe there is a reference some to" -- it says "consideration." Our recollection -- and

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1 this is something I raised with Mr. Dubin I think the day after  
2 the testimony -- was that it should read "cancellation" rather  
3 than "consideration." We think that is clear and consistent  
4 with his testimony and not --

5 THE COURT: Now, I am going with the transcript. That  
6 is what all that we can rely on. You are supposed to be  
7 reading the transcript. If there is a discrepancy --

8 MR. COWLEY: We raised it with them the day after his  
9 testimony.

10 THE COURT: You didn't raise it with me and he came  
11 back, so I am going with the transcript.

12  
13 (Continued on next page)

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Summation - Mr. Cowley

1 (Jury present)

2 THE COURT: We are going to have closing arguments  
3 now. The government goes first and Mr. Tacopina on behalf of  
4 Mr. Balboa and the government has an opportunity for rebuttal  
5 argument. That will take us most of the morning. We will have  
6 a luncheon break, and I will charge the jury.

7 Mr. Cowley.

8 MR. COWLEY: Thank you, your Honor.

9 If it please the Court, counsel.

10 Ladies and gentlemen, Michael Balboa committed fraud.  
11 How did he commit fraud? He committed it by manipulating and  
12 undermining the independent valuation process that was in place  
13 for his fund, and he used that particular security that you  
14 have heard so much about -- the Nigerian Oil warrant -- to  
15 drastically inflate the fund's net asset value and the fund's  
16 performance numbers. By doing this, Mr. Balboa lied to  
17 investors. He lied about how the fund's independent valuation  
18 process was going to work, and he lied about how the fund was  
19 actually performing and these issues were of critical  
20 importance to investors. You heard several investors talk  
21 about that. And as a result of these lies, investors put more  
22 money into Mr. Balboa's fund or decided to keep their money in  
23 Mr. Balboa's fund and that is fraud. By doing so, Mr. Balboa  
24 broke the law.

25 We submit to you that the evidence that you have heard

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Summation - Mr. Cowley

1 in this case, the evidence of the false promises and the false  
2 representations that Mr. Balboa made, the evidence of the  
3 secret communications between Mr. Balboa and Mr. Pratt and  
4 Mr. De Charsonville, and the evidence of Mr. Balboa's  
5 overwhelming efforts to lie and hide what he had done from  
6 Millennium and regulators started looking into his conduct.  
7 All of that evidence leads to one conclusion -- that Mr. Balboa  
8 is guilty of the charges that are set forth in the indictment.

9 Now, today during my summation, I am going to explain  
10 how the evidence that you have heard points to that inescapable  
11 conclusion.

12 I am going to talk about three broad categories of  
13 evidence.

14 Here is the first category: The misrepresentations  
15 that were made to investors. These are the promises that were  
16 made to investors about how the fund was going to be valued.  
17 And as part of that, I am going to talk to you about  
18 Mr. Balboa's direct involvement in these lies that were being  
19 told to investors. I am also going to talk with you about how  
20 these representations about the valuation process were critical  
21 to investors' decisions to invest in Mr. Balboa's fund.

22 The next thing that I am going to talk with you about  
23 is the overwhelming evidence that shows that Mr. Balboa  
24 secretly and fraudulently manipulated that independent  
25 valuation process in direct contradiction to the

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Summation - Mr. Cowley

1 representations that were made to investors. This includes the  
2 impact that these misrepresentations had on the fund's  
3 valuation and fund's performance numbers that were reported to  
4 investors month in and month out.

5 The third category I am going to talk to you about is  
6 the overwhelming evidence that shows that Mr. Balboa was  
7 intentionally committing fraud.

8 This last one in particular, one of the things you are  
9 going to hear talk about is Mr. Balboa's repeated efforts to  
10 cover up his scheme after Millennium and regulators started  
11 looking into it.

12 Let's talk about the first category,  
13 misrepresentations to investors. You have looked at a lot of  
14 documents in this case. You have looked at DDQs, offering  
15 memorandums ad nauseam. What I am going to do now is walk  
16 through some of the important parts of the DDQ's and some of  
17 the important parts of the offering memorandums to flesh out  
18 the representations that were made to investors about the  
19 valuation process.

20 Let's start with DDQs. If you recall, these are the  
21 due diligence questionnaires. They were a series of questions  
22 that investors had, they would send to the fund or send to  
23 GlobeOp and they would provide answers back. Let's look at  
24 some of those.

25 For example, here is Government Exhibit 55.1. This is

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Summation - Mr. Cowley

1 as DDQ from January 10, 2008. And what is happening here is a  
2 potential investor based right here in Manhattan, Citi  
3 Alternative Investments, sent a DDQ to GlobeOp asked them how  
4 is the investment process going to work for Mr. Balboa's fund.  
5 Well, there is a back-and-forth between GlobeOp and Millennium  
6 where Millennium says, it is OK for you to fill this out, but  
7 we want to review and approve it.

8 Here is the email reviewing it. Michael Balboa is on  
9 it, and they are giving GlobeOp the green light to send this  
10 out. Look at the representations that are made about how the  
11 fund going to be valued in this DDQ. They ask, what are  
12 sources for pricing and what is the representation that is  
13 made? Well, for listed securities, GlobeOp used Reuters or  
14 Bloomberg for things like Apple, IBM, whatever. For thinly  
15 traded securities, what are used? Counterparty marks are  
16 used -- not manager marks, not what Mr. Balboa thinks --  
17 counterparty marks are used.

18 What are some other representations that are made?  
19 How are pricing disputes between the back office and the  
20 portfolio manager, Mr. Balboa, how are they resolved and  
21 documented? Again, what is the representation that is made?  
22 Counterparty marks are considered final.

23 What else? What is the involvement of the  
24 administrator in the evaluation process? Does it independently  
25 value 100 percent of the portfolio at month end using prices

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Summation - Mr. Cowley

1 obtained directly from brokers or vendors? Again, how are  
2 pricing disputes between the manager and the administrator  
3 resolved? What is the takeaway here? The manager is involved  
4 with following up with counterparties to provide statements in  
5 case there is some sort of dispute, but at the end of the day,  
6 manager marks are not used to price the portfolio. That is a  
7 representation that is made over and over and over again.

8 Let's look at some other DDQs, Government Exhibit 9.  
9 This is a DDQ that is sent out March 7, 2008 to a potential  
10 investor named Jeff Holland on behalf of this company. What  
11 were the representations made here: Where assets are valued  
12 in-house, please provide a summary of the controls in place to  
13 insure accuracy.

14 What is the representation made? There are no assets  
15 valued in-house, no assets valued by Mr. Balboa, the portfolio  
16 manager.

17 And, again, what else do they ask? Are at least three  
18 independent prices available for non-exchange traded  
19 investments? The answer: At month's end, the fund's valuation  
20 agent, GlobeOp, receives counterparty marks on all of the  
21 positions and are able to compare these to their own valuations  
22 that have been made. They are asking specific questions about  
23 obtaining independent marks. They are being told time and time  
24 again, there are no assets being valued in-house.

25 Let's look at another DDQ -- actually, here is a

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Summation - Mr. Cowley

1 reference to the fund appointing independent valuation agent.

2 All right. This is a DDQ. It was sent to Matt Daniel  
3 in April of 2008. Again, the same representation appears:  
4 There are no assets valued in-house.

5 Then we come to Government Exhibit 2, and this is an  
6 exhibit you have seen a lot of. This is the DDQ that was  
7 issued -- it was June 30, 2008. And what language is included  
8 in here? Now, there is an addition that the portfolio manager  
9 for MGEC retains oversight capacity. We will talk a little bit  
10 later about what oversight capacity it means and what it  
11 doesn't mean, but what is the representation that still being  
12 made to investors -- that there are no assets valued in-house.

13 In addition, you know that Mr. Balboa is signing off  
14 on these representations. Ms. Gibson-Starks said that?

15 Was he involved in reviewing and approving these DDQs?  
16 The answer is yes. You know that from the documents. In  
17 September 2008, you see an email. This involves  
18 Ms. Gibson-Starks CC'ed showing that Michael Balboa is signing  
19 off on that exact language that you just saw on the DDQ. The  
20 oversight language but, again, the specific representation that  
21 no assets are valued in-house -- even specific inquiries from  
22 specific investors about the independence of the fund's  
23 valuation procedures.

24 Let's take a look at another email communication  
25 involving Mr. Daniels. So in January 2008, Mr. Daniels emails

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Summation - Mr. Cowley

1 specific questions about the valuation procedures, the pricing  
2 procedures that are being used by the funds.

3 Ms. Molberg is reaching out to Michael Balboa to  
4 review and approve a particular response. One of the things he  
5 is asking about is pricing procedures, what percentage of  
6 portfolio is marked by the dealers internally. He wants to  
7 know is Mr. Balboa going to be providing values for any of the  
8 securities in this fund.

9 What is the answer, the report back? That prices is  
10 externally marked, i.e., not marked by the portfolio manager,  
11 but by the valuation agent and that they use counterparty  
12 marks.

13 What is the response? Mr. Balboa wants to change  
14 about some other topic that is in the email, but in terms of  
15 these representation about valuations, all of the rest are OK.  
16 And, sure enough, that is the representation made to Mr.  
17 Daniels. You see it right there.

18 So as early as January 2008, Mr. Balboa is personally  
19 involved in approving representations about the independence of  
20 the fund's valuation process.

21 Now, in addition to these DDQs, you also saw offering  
22 memorandums. These are sort of the information documentation  
23 that Millennium sends out saying this is how our funds works.  
24 And there are representations in there about how the funds  
25 valuation process is going to work, for example, Government

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Summation - Mr. Cowley

1 Exhibit 1A. This is an offering memorandum from March of '08.  
2 And it says, in the absence of an OTC market price -- it means  
3 over-the-counter market price -- the directors or their  
4 delegate will seek to obtain a quotation from at least two  
5 independent, recognized investment banks and the average of  
6 such quotations will be taken.

7 These are the representations made time and time again  
8 about the independence of the valuation process, the sort of  
9 checks and balances that are in place so that investors have  
10 comfort that they are getting accurate numbers about the fund's  
11 value and the fund's performance month in and month out. And  
12 investors relied on these representations.

13 For example, you heard from Mr. Daniel. He invested  
14 about \$13 million of his client's money. He met with  
15 Mr. Balboa right here in Manhattan. You heard him on the  
16 witness stand say this:

17 "Q And as a current or preexisting investor in the Millennium  
18 Fund, at the time of this email why were you interested in  
19 knowing whether or not any of the fund's assets were being  
20 internally marked?

21 "A Because it's an area of risk from our perspective. As we  
22 talked about earlier, it is a conflict of interest and we  
23 wanted to know if any of that is going on, and I asked it to  
24 see if there is any change, to see if we invested previously."

25 You heard this also from Raj Keswani and Charles

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Summation - Mr. Cowley

1 McNally, two other investor witnesses. Mr. Keswani invested  
2 between 10 or 20 million of clients' money in the fund and they  
3 all sent their money to a bank account right here in Manhattan.  
4 Here's what Mr. Keswani said. He used the metaphor of sort of  
5 separation of church and state, checks and balances to make  
6 sure that he is getting an accurate number and he is asked to  
7 explain this and why it is important to him. He says that  
8 because at times in investing, the interest of the portfolio  
9 manager may not be in line with the interests of the investor  
10 and somebody has to keep those things in balance, and  
11 independent valuation is one of those things. "It would be like  
12 me having a bank account at Chase and then the way Chase  
13 determines that what's in my bank account, they call me each  
14 month and ask me what my balance is and I tell them and they  
15 say good, that's your balance. Good for me, not good for  
16 Chase. That's why you've got that independent valuation  
17 function."

18 Again, investors want comfort that they are getting  
19 reliable, truthful, correct numbers in terms of performance and  
20 how their investment is doing.

21 You heard Mr. McNally talk about this as well. What  
22 did he say?

23 "Q Mr. McNally, did your understanding that the fund would be  
24 using external sources for valuation purposes factor into your  
25 decision to have Lyster Watson invest in the Millennium Fund?

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Summation - Mr. Cowley

1 "A Yes. As I said, we would not have invested in that fund,  
2 or any other fund if it used internal sources for valuating  
3 positions."

4 So you know that these representations were important  
5 to investors.

6 I want to move on and talk about the second category  
7 of evidence that we mentioned, which is the overwhelming  
8 evidence that shows that Balboa secretly and fraudulently  
9 manipulated this valuation process, that he broke the promises  
10 that were being made to investors.

11 Now, you have heard evidence during this trial  
12 including witness testimony, a paper trail of multiple emails  
13 and audio recordings between Mr. Balboa and Mr. De  
14 Charsonville. They all point to that same conclusion that  
15 working behind the scenes, Mr. Balboa manipulated this process.

16 Let's begin with the testimony of Sam Pratt and Gilles  
17 De Charsonville. They both testified that they agreed to do a  
18 favor for Mr. Balboa at his request, that is, to provide  
19 counterparty marks to GlobeOp. They both agreed to do this  
20 favor, because as they readily admitted, they were sales guys  
21 and they were interested in cultivating more business with Mr.  
22 Balboa.

23 Beginning in January 2008, there is a pattern that  
24 quickly emerges. Balboa simply uses Pratt and DeCharsonville  
25 as essentially mouthpieces to pass on his own valuation, his

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Summation - Mr. Cowley

1 own mark to GlobeOp. And this happens month in and month out.

2 As my colleague Mr. Miller told you at the beginning  
3 of this trial, you should analyze the testimony of Mr. Pratt  
4 and Mr. De Charsonville carefully. You should use your reason  
5 and your common sense to figure out whether or not you think  
6 they are being honest.

7 And what is one way to assess the accuracy of their  
8 testimony? Check that against the multitude of documents in  
9 this case. Check that against the emails that you have seen  
10 and the audio calls that you have heard.

11 Now, I am not going to waste your time by walking  
12 through each and every month of the valuations that you have  
13 seen here. I am going to walk you through a few so that you  
14 get a sense of Mr. Balboa's fraud at play.

15 Let's start in January 2008 when GlobeOp reaches out  
16 to Mr. De Charsonville and Mr. Pratt to obtain marks. You  
17 recall the testimony of Pratt and De Charsonville. Let's see  
18 if their email communications back up that testimony.

19 One representation that Mr. Tacopina made to you in  
20 the opening is what this evidence will look like. Here's what  
21 he said: "When those emails are looked at in full context, you  
22 are going to see that nothing criminal is going on at all,  
23 nothing criminal. This wasn't like valuing IBM stock. One of  
24 the ways that you know nothing criminal was going on is that  
25 everything was open. Every single thing was out in the open,

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Summation - Mr. Cowley

1 on the emails, the phone calls, recorded lines. Nothing was  
2 hidden."

3 Let's go to the emails. Let's break it down between  
4 what GlobeOp saw and what they didn't see.

5 So, first, Ambika Banerjee on January 11th reaches out  
6 to Gilles De Charsonville for a mark on the warrant. It is  
7 about 6:38 a.m. What happens then? Mr. De Charsonville  
8 forwards that on to Mr. Balboa -- of course not copying  
9 GlobeOp, saying, "Mike, what do you know?" This is the sort of  
10 language that evidence the kind of agreement that is developing  
11 between Mr. Balboa and Mr. De Charsonville. This shows  
12 Mr. Balboa that Mr. De Charsonville has no idea what a price  
13 is. He is not going to be some sort of independent source.

14 How does Mr. Balboa respond? "525" -- He just gives  
15 him a number to pass on. Again, GlobeOp is not privy to these  
16 communications. And what happens? Mr. De Charsonville sends  
17 it right back. Now, GlobeOp thinks they have obtained an  
18 independent mark from Gilles De Charsonville when really it is  
19 coming from the portfolio manager.

20 What happens with Mr. Pratt? That same day they  
21 reached out to him for a counterparty mark on the warrant.  
22 What happens? Within about 10 minutes, Mr. Balboa reaches out  
23 to Mr. Pratt and said, if GlobeOp asks, here is the price, 525.  
24 And what does Mr. Pratt say? "OK. Will do." Again, a clear  
25 indication to both parties in this communication that Mr. Pratt

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Summation - Mr. Cowley

1 is just going to pass on Mr. Balboa's number, and sure enough  
2 he does. No debate. No discussion. Just Mr. Balboa directing  
3 what the number should be in complete contradiction to reps  
4 made to investors. The pattern plays out month after month.

5 Government Exhibit 6009. This is a summary chart and  
6 it shows the numbers that Mr. Balboa is passing on to De  
7 Charsonville and Pratt, month in and month out. Look at this  
8 see this escalation. This is him secretly feeding higher and  
9 higher numbers every month to GlobeOp through Gilles De  
10 Charsonville and Sam Pratt while everybody thinks these are  
11 independent counterparty sources. Make no mistake, these  
12 numbers that Mr. Balboa passes on are, as Mr. Knapp said, in no  
13 way linked to reality.

14 Take a look at Government Exhibit 6000. This is a  
15 summary of the actual known trade prices. These were trades  
16 that were actually known to have taken place, that actually  
17 took place. What do you see? That in all of 2008, the highest  
18 trade price is \$239. Now, let's compare this reality to  
19 Mr. Balboa's lies.

20 Take a look at Government Exhibit 6002. This chart is  
21 very powerful. On the blue line on the bottom is the actual  
22 trades, where the warrant is actually trading at what its  
23 actual value is. The red line is the number that Mr. Balboa is  
24 causing GlobeOp to mark the warrant at. Look how reality and  
25 Mr. Balboa's lies begin to separate and separate drastically.

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Summation - Mr. Cowley

1           Now, by August of '08, the warrant was actually  
2 trading at around 200 bucks. Mr. Balboa is causing it to be  
3 marked by GlobeOp at 3,600. That is around 18 times higher  
4 than what this thing is actually trading at.

5           Let's walk through the valuation for that month  
6 August, sort of see how Mr. Balboa pulls off this fraud and  
7 some other things that are going on at the time. We will break  
8 it up again between the emails that GlobeOp was on, email  
9 communications involving Balboa behind the scenes that GlobeOp  
10 didn't get the benefit of.

11           So, first, Gilles De Charsonville reaches out to  
12 Balboa and says, when are you free to mark-to-market. Here is  
13 Mr. Balboa's response: "Can we do it tomorrow? Like to see  
14 where everything else comes in first."

15           This is an important email because here is Mr. Balboa  
16 saying he wants to see where all of the other securities come  
17 in first. That shouldn't have anything at all to with where he  
18 is marking the Nigerian warrant. The month is over but he  
19 wants to see if he needs to jack up that price to get the  
20 numbers that he needs. This ladies and gentlemen, is what the  
21 conspiratorial agreement looks like. It is an understanding  
22 that Mr. Balboa is waiting to pass on whatever numbers he wants  
23 to Mr. De Charsonville and he will pass it on.

24           How does Mr. De Charsonville respond?

25           "Sounds good. No worries. I'm going to story it for

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Summation - Mr. Cowley

1 GlobeOps."

2 What happens after that? So on September 1, that same  
3 day, Mr. Balboa actually gets an offer to purchase the Nigerian  
4 warrants where? It is around 214 to 219 on screen. This is  
5 Patrick Willis from Exotix, so the security is being offered  
6 September 1st 214 to 219, 219 being the offer price. Let's see  
7 the number that he gives to Mr. DeCharsonville the very next  
8 day. Here is the second offer and then let's go to the  
9 September 2nd call.

10 (Audio recording played)

11 MR. COWLEY: Multiple amounts from an offer he is  
12 receiving the very day before.

13 What happens after that? True to form, Mr. De  
14 Charsonville, pursuant to the understanding they have reached,  
15 passes that number right on to GlobeOp. Again, GlobeOp doesn't  
16 get to see that interaction between Mr. De Charsonville and  
17 Mr. Balboa; they just think that they are getting an  
18 independent counterparty price, consistent with representations  
19 that have been made to investors.

20 Where do we go after that?

21 On September 2, there is Mr. De Charsonville  
22 forwarding the price two minutes later after he passes on to  
23 let Mr. Balboa know that he has passed on the exact price that  
24 he has given to GlobeOp.

25 What else is happening around this time period?

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Summation - Mr. Cowley

1           On September 5, so right about three days after this,  
2           Mr. Balboa is approving language to be sent to investors that  
3           no assets are valued in-house. What you have just seen, three  
4           days earlier is Mr. Balboa secretly valuing his own assets in a  
5           fund while at the same time he is approving representations to  
6           investors that no assets are valued in-house.

7           What else happens?

8           Here, September 12, Mr. Balboa goes back to GlobeOp  
9           and he says, please query BCP again. What that means is, BCP  
10          that's where Gilles De Charsonville works, so he is asking  
11          GlobeOp to go back to De Charsonville for another number for  
12          the Nigerian warrant.

13          September 12th, what has happened between the last  
14          time where Mr. De Charsonville provided the original mark and  
15          this? Mr. Balboa is getting the initial numbers. He has seen  
16          the initial math that GlobeOp is coming up with in terms of  
17          what the net asset value is going to be, what performance is  
18          going to look like and he wants to raise the number of the  
19          Nigerian warrant to help him out. So this is what he does. He  
20          has them go back to BCP and sure enough GlobeOp does, pursuant  
21          to Mr. Balboa's request -- nothing inappropriate about this  
22          part of things, but let's look at what happens next.

23          So he is queried and Mr. De Charsonville reaches out  
24          to Mr. Balboa, what should I send now? Again, it is crystal  
25          clear that these number are coming from Mr. Balboa, not Gilles

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Summation - Mr. Cowley

1 De Charsonville. Mr. Balboa knows that. He is getting a  
2 communication from Gilles De Charsonville saying, what should I  
3 send now?

4 What does Mr. Balboa send back? He jacks it up a  
5 little bit 3275 to 3875. Then he passes that right along.

6 Again, GlobeOp thinks they have obtained an  
7 independent counterparty mark. In reality, Mr. Balboa, the  
8 portfolio manager, is the one behind these prices. This is not  
9 open and transparent. All of these communications between  
10 Mr. Pratt and De Charsonville -- and Mr. De Charsonville in  
11 this particular instance -- are hidden from GlobeOp.

12 Now, you have seen a lot of other bits and pieces of  
13 the DDQs and the offering memorandums, and I anticipate you  
14 will hear a lot from Mr. Tacopina in his closing. For example,  
15 he showed you this section of Government Exhibit 1A, the  
16 offering memorandum, about the directors or the delegates -- it  
17 will be valued at fair value, taking into account actual market  
18 prices and market prices of comparable investments and other  
19 such factors as reasonably determined by the directors or their  
20 delegates.

21 He talked with you a little bit about this language in  
22 his opening. This is what the evidence will show. Those very  
23 same documents, ladies and gentlemen, specifically say that  
24 Mr. Balboa and other directors at this Millennium fund had  
25 complete authority to make adjustments to valuations that they

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Summation - Mr. Cowley

1 got from the independent valuation agent, the complete  
2 authority.

3 Well, Mr. Balboa was not a director of the fund. The  
4 directors of the fund were these three individuals -- Michael  
5 Collins, Debbie Sebire and James Keyes.

6 Nor was Mr. Balboa a delegate. Here is what the  
7 compliance officer, Maria Gibson-Starks told you. She was  
8 asked exactly that:

9 "Q Is Mr. Balboa or has he ever been a director of Millennium  
10 Global?

11 "A No.

12 "Q Was he ever delegated any authority by the directors of  
13 Millennium Global" -- and it says "valuations"?

14 "A No.

15 "Q If that had been done, would that have been disclosed to  
16 investors?

17 "A Yes.

18 "Q Why?

19 "A Because that's a material issue, a material matter."

20 What are some of the other things that you have seen?

21 Here's another representation of the offering  
22 memorandum that says that the valuation agent can, of course,  
23 consult with the investment manager.

24 Finally, the third thing that you have seen,  
25 Government Exhibit 2 is this reference to oversight capacity.

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Summation - Mr. Cowley

1           Now, ladies and gentlemen, what are the most important  
2 things that you all bring to this trial process is your reason  
3 and your common sense.

4           Now, in looking at this language, this is all -- the  
5 three provisions that we just showed you -- a red herring. In  
6 no instance did Mr. Balboa stand up, talk to GlobeOp and say,  
7 you know what, there are no counterparty prices, nobody can  
8 find a mark. Nor does say, you know what, I disagree with  
9 these counterparty prices. Let me show you why I think these  
10 numbers should be marked higher. Let me consult with you. In  
11 no instance is any sort of discussion like that being had.  
12 What is going on instead is Mr. Balboa is secretly being the  
13 source of counterparty marks. So every month GlobeOp thinks  
14 they are getting independent counterparty prices, and they are  
15 using those prices. Oversight capacity does not mean hiding  
16 behind Gilles De Charsonville and Sam Pratt. Consulting with  
17 GlobeOp, again, does not mean secretly feeding prices to Sam  
18 Pratt and Gilles De Charsonville. Do not believe for a moment  
19 that any of the language you just looked at authorizes that  
20 kind of conduct. It is a red herring.

21           You know else who gets the difference between  
22 oversight capacity, raising objections and concerns on one hand  
23 and secretly being your own source of marks? GlobeOp. Eammon  
24 Greaves talks about this. What does he say?

25 "Q If Mr. Balboa had sent you any marks for any of the

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Summation - Mr. Cowley

1 securities in his own fund, could GlobeOp have utilized that to  
2 value the fund?

3 "A No.

4 "Q Why not?

5 "A Because they are not coming from an independent party.

6 "Q Can you raise objections and concerns if GlobeOp, in the  
7 midst of crunching its numbers and determining appropriate  
8 values?

9 "A Absolutely.

10 "Q Can he be the source that GlobeOp relies upon to value any  
11 securities in the funds?

12 "A No. This is the difference between oversight capacity and  
13 raising objections and concerns openly and transparently on one  
14 hand and secretly being the source of counterparty marks that  
15 everybody thinks is coming from independent sources.

16 There are a lot of defense exhibits that were actually  
17 entered that draw this contrast quite well. Let's look at  
18 Defense Exhibit F. Here is an example. Mr. Balboa is  
19 interacting with UBS and GlobeOp, fully transparently, GlobeOp  
20 on this email, raising objections or concerns about how a  
21 particular security should be marked. Here he is saying "wrong  
22 CD," you marked the wrong security. This is oversight  
23 capacity. This is consultation.

24 Let's look at Defense Exhibit L. Again, he is  
25 interacting with Andrew Howe, a counterparty, a number of

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Summation - Mr. Cowley

1 people at GlobeOp. He is raising objections and concerns about  
2 an evaluation that an independent counterparty has provided in  
3 full view of GlobeOp. This is what those representations in  
4 those documents are talking about.

5 Defense Exhibit V. Again, he is chasing down a  
6 counterparty mark because he knows that a source has to come  
7 from a counterparty. He can't just say, I think it is X, Y, Z.

8 Defense Exhibit BB. He is telling GlobeOp, I plan on  
9 querying this counterparty about this. I have an objection. I  
10 have a question. He even says, I will copy you on my query.  
11 So that is what oversight capacity is, consultation is.

12 Let's compare that to his communications involving the  
13 Nigerian warrant. Let's look at Government Exhibit 507, a  
14 communication not in view of GlobeOp between Pratt and Balboa  
15 where it says that if GlobeOp asks, it is 525.

16 703, again, just giving him a range to pass on. No  
17 sort of open discussion, nothing transparent about that.

18 1009. "Please revise up, 2240 to 2440."

19 Again, this is Mr. Balboa secretly serving as the  
20 source, hidden from GlobeOp, just directing Mr. De Charsonville  
21 what to put.

22 Government Exhibit 1104, again: "Do it very wide,  
23 2650 to 3680." Hidden from GlobeOp. This is what is going on  
24 with the Nigerian warrant.

25 Government Exhibit 1155: "Tell them it was 3275 to

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Summation - Mr. Cowley

1 3875." A clear direction. This is not raising concerns or  
2 objections to GlobeOp. This isn't consulting with the  
3 valuation agent. This is lying. This is giving everyone the  
4 impression that the numbers are coming from independent  
5 counterparties when in fact Mr. Balboa himself, the portfolio  
6 manager is the source.

7 You know who else gets this distinction? Several of  
8 the defense witnesses you heard from. Let's look at a few  
9 quotes from them.

10 Here's what Anthony Warnars said -- that was the  
11 readback where Mr. Seigel sat in the witness box.

12 "Q Would it be appropriate for a portfolio manager to have his  
13 counterparties pretend that those are independent prices that  
14 did not come from the portfolio manager himself?

15 "A I find that inappropriate."

16 Here is what Ms. Molberg said:

17 "Q It's true Millennium couldn't dictate or direct  
18 counterparties to provide specific marks to GlobeOp no  
19 questions asked?

20 "A That's correct.

21 "Q So the portfolio manager at Millennium, right, couldn't  
22 direct the counterparties to give GlobeOp a particular mark?

23 "A No, he couldn't.

24 "Q It is fair to say that the counterparties could take  
25 Mr. Balboa's views into account and exercise their own

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Summation - Mr. Cowley

1 independent judgment to make a final determination?

2 "A I would hope they would do that, yes.

3 "Q Millennium can't create the appearance that the marks were  
4 coming from counterparties' independent analysis when in fact  
5 those marks were coming from Millennium itself, true? Can't  
6 disguise the source of information, right?

7 "A No. Sources have to be open and transparent."

8 Even Mr. Charlesworth during his testimony said  
9 something similar. He said all sorts of things in the  
10 abstract. When he was asked particular questions about  
11 representations that his own fund of funds makes in his  
12 process:

13 "Q It is described that the valuation would obtain prices  
14 independently from you, correct?

15 "A Yes. That's a fund of funds.

16 "Q Let's talk about that. So that is the representation that  
17 you made to investors in your documents, correct?

18 "A Yes.

19 "Q What that means is that when your fund is being marked,  
20 every month that people independent from you come up with  
21 prices for those marks, correct?

22 "A Correct.

23 "Q All right. Then they give them to the valuation agent?

24 "A Correct.

25 "Q Under that scenario, you certainly never directed any of

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Summation - Mr. Cowley

1 these counterparties to provide certain numbers to the  
2 valuation agent, have you?

3 "A No.

4 "Q You would agree that would be contrary to the  
5 representations made to the investors, right?

6 "A Yes.

7 "Q Right?

8 "A But I was dealing with different instruments.

9 "Q Sure. Different instruments, but bottom line is  
10 representation was made?

11 "A The answer is yes."

12 Even the defense witnesses get this distinction  
13 between secretly providing counterparty marks through Gilles De  
14 Charsonville and Sam Pratt versus oversight capacity in full  
15 view of GlobeOp. It is crystal clear even for the defense  
16 witnesses.

17 I want to talk to you now about the impact that these  
18 lies had on the overall net asset value of the fund and the  
19 representations that were being made to investors.

20 Let's look at Government Exhibit 6004. This shows  
21 Mr. Balboa buying up the Nigerian warrants, accumulating  
22 position in early 2007. So by March 8, 2007, he is holding  
23 23,500 Nigerian warrants in his fund. That is the number of  
24 Nigerian warrants that he is holding in his fund.

25 Also, look at the reference in the bottom right. He

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1 is buying these. They are clearing through Exotix -- that is  
2 Federico Sequeira's company; BCP -- that's where Gilles De  
3 Charsonville works -- and UBS. Keep that in mind. We will  
4 talk about that a little later.

5 Now take a look at Government Exhibit 6005. This  
6 shows that the impact on the overvaluation of the Nigerian  
7 warrant had on the overall position in these warrants that the  
8 fund held. So bottom line is, number of warrants, 23,500 times  
9 what the price of the value of each of these warrants is. So  
10 what the blue represents is that number 23,500 times the  
11 highest known trading price for all of 2007, 2008 -- that is  
12 \$258. That means the fund's position in these warrants would  
13 be about \$6 million in value.

14 Now, when you take that same number, 23,500 and  
15 multiply it by the marks that Balboa is secretly passing on  
16 through Pratt and De Charsonville, that's where you get the  
17 red. That's where you get the fraud. So let's look starting  
18 in May. There is a \$26 million difference between Balboa's  
19 lies and reality. By June, there is a \$48 million difference  
20 between Balboa's lies and reality. By July, a \$74 million  
21 difference. By August, a \$78 million difference. And the  
22 inflation of the warrants affected the net asset value of the  
23 fund. This is Government Exhibit 6006.

24 So bottom line, by August '08 the net asset value, the  
25 number that is important for tracking performance of the fund

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1 is 80 million in total, but 10 percent of that, about \$80  
2 million, where is that coming from? Through Mr. Balboa's  
3 fraudulent inflation of the Nigerian Oil warrant.

4 You heard Mr. Charlesworth talk about, oh, the gross  
5 exposure is very important. That is all well and good, it is  
6 true. That is an important number for risk, but in terms of  
7 tracking performance of the fund, how your investment is doing,  
8 the NAV is critical. And these documents show you the impact  
9 that the Nigerian warrant had on the net asset value. \$80  
10 million is an important number. It is a big number. Don't  
11 believe it is miniscule for a minute.

12 Here are some of the investors talking about the  
13 importance of the NAV. Raj Keswani, nothing is more important.  
14 And I think even Mr. Charlesworth admitted that in terms of  
15 tracking performance, that the NAV is critical.

16 "Q We are talking about performance percentages. Those  
17 numbers are pretty closely related to the net asset value,  
18 right?

19 "A They are the net asset value."

20 So this is how Mr. Balboa continued to escalate those  
21 prices month in, month out to affect performance.

22 Mr. Keswani said something actually very interesting  
23 about the concept of smoothing the numbers. I want to go into  
24 that for a moment. He is asked what is the incentive that a  
25 portfolio manager has to inflate the numbers to smooth out the

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Summation - Mr. Cowley

1 numbers. The bottom line is, if you are going to have a  
2 negative one. You can just sort of bump up the security a  
3 little bit to get to a positive one, that is going to be  
4 helpful because investors are going to look how long your  
5 positive performance is. Let's say you have an awful month and  
6 you want to cushion the blow a little bit, then you can  
7 manipulate the process a little bit to make it seem not quite  
8 as bad. That's exactly what Mr. Balboa did.

9 Let's take a look at Government Exhibit 6003. So  
10 notice the difference, how the value from the Nigerian warrant  
11 is jacked up from May to June. It is about a \$1,000 escalation  
12 there. Look again from June to July, another \$1,000  
13 escalation. Let's look at how that escalation affected the  
14 performance numbers.

15 Let's go to 6007. So what this says, the red dot for  
16 June is the fund's reported performance, .17 percent positive.  
17 Had Mr. Balboa just left the number for the Nigerian warrant  
18 the same, had he not escalated it by \$1,000, just left it the  
19 same as the previous month, the fund would have had a reported  
20 performance of negative 2.61 percent. That is smoothing the  
21 numbers.

22 You will recall from June to July, he raises it  
23 another \$1,000. And what is the impact of that? He avoids  
24 reporting the worst performance in the fund's history. He  
25 would have to report a negative 6.2 percent. Instead, he is

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Summation - Mr. Cowley

1 able to cut that in half so, instead, investors see a swing  
2 from .17 positive to negative 6.2 percent, they see a much  
3 smaller swing to negative 3.16 percent. That is smoothing the  
4 numbers. That is exactly the kind of thing Mr. Keswani said  
5 that you need to look out for as an investor.

6 Here is what Mr. McNally, investor, said about the  
7 impact of performance on his decision to invest, that based on  
8 how the fund is looking in 2008, that's how they made their  
9 decision in August 2008 to invest.

10 You can go on. Mr. Daniel also talked about the  
11 importance of performance.

12 Government Exhibit 6006, please. Now you see, you  
13 have gone behind the scenes. You now know how Mr. Balboa  
14 pulled that off, that pillar of fraud based on the Nigerian  
15 warrants. That's how he was able to get the numbers he needed  
16 to smooth things out a little bit in a very volatile time.

17 Why did Mr. Balboa do this, ladies and gentlemen?  
18 Greed, plain and simple, for money.

19 Let's take a look at Government Exhibit 1A. Now,  
20 there are two aspects. He gets a salary, but most of his  
21 compensation comes from a bonus. There are two components to  
22 that. There is the performance fee and there is the management  
23 fee.

24 I want to talk about the management fee first. You  
25 don't have to hit some kind of high water mark to get the

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Summation - Mr. Cowley

1 management fee. It is based on the NAV and that is accumulated  
2 month in and month out. So the way it works is the manager  
3 receives a management fee paid quarterly in arrears, about  
4 one-fourth to 2 percent of the net asset value.

5 So the number that you are talking about, for example,  
6 for a NAV of \$800 million, 2 percent of that is \$16 million.  
7 Paid in quarters, that is \$4 million. Now, to be clear, not  
8 all of that money goes to Mr. Balboa. It is used to pay for  
9 other salaries, things like that, but that is definitely a part  
10 of Mr. Balboa's compensation and incentivizes him to keep the  
11 NAV as high as possible. Indeed, after the fund is liquidated,  
12 what did Mr. Balboa tell Sam Pratt? That Millennium still owes  
13 him millions of dollars. This is the type of millions that can  
14 come from a manager fee.

15 Now, performance fee is paid if you hit that high  
16 water mark. You have a good quarter and you're positive.

17 Let's look at Government Exhibit 12.8. He gets a  
18 performance fee for the first quarter. See the three positive  
19 marks. He doesn't get one for the second quarter -- April, May  
20 and June. He lost some money in April. Now, July and August,  
21 he is starting to come back. Look at August, he positive by  
22 over 4 percent. Now, the fund goes into liquidation in  
23 October. But it is not as if he knows that. He is still  
24 incentivized until the day the fund went out of business to  
25 push for that performance fee.

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Summation - Mr. Cowley

1 Mr. Greaves talked about that. Here is what he said:

2 "Q Is it fair to say that the incentive to obtain a  
3 performance fee continued up to the very last day the fund went  
4 into liquidation?

5 "A Yes."

6 So up to the very last day that the fund was in  
7 existence, he is incentivized to try to get that performance  
8 fee.

9 Now, ladies and gentlemen, I am going to shift and  
10 talk with you about the third category of evidence. That's the  
11 evidence that Mr. Balboa knew what he was doing was wrong.

12 First, make no mistake, Mr. Balboa knew that Mr. Pratt  
13 and Mr. De Charsonville were just passing on his prices. He  
14 didn't think that Mr. Pratt and Mr. De Charsonville were out  
15 there conducting their own diligence and coming up with these  
16 numbers by themselves. Here's what Mr. Pratt had to say on  
17 this:

18 "Q Between January and April of 2008, did you tell Mr. Balboa  
19 that you cannot find a price indication for the Nigerian  
20 warrant?

21 "A Yes, I did.

22 "Q Was that in one conversation or was that in multiple  
23 conversations?

24 "A Multiple conversations.

25 "Q After you informed Mr. Balboa that you could not find a

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Summation - Mr. Cowley

1 price for the Nigerian warrant, what did he continue to ask you  
2 to do?

3 "A Pass on the prices that he was giving me."

4 This is the understanding. This is the conspiratorial  
5 agreement. It doesn't have to be in a written contract. It  
6 doesn't have to be Mr. Balboa saying, Sam I would like you to  
7 help me undermine the independent valuation process. This is  
8 Mr. Pratt telling Mr. Balboa, I can't come up with prices. I  
9 don't know what the prices are. And Mr. Balboa, month in and  
10 month out, just asking Mr. Pratt to continue to pass on his  
11 numbers.

12 You don't have to just take Mr. Pratt's word for it.  
13 Let's look at some exchanges between Mr. De Charsonville and  
14 Mr. Balboa that document that exact same understanding.

15 Here is an email, Government Exhibit 863: "Mike,  
16 GlobeOp is asking for a justification of the Nigerian warrant  
17 move from 500 to 1300 to 1500."

18 There was a big jump that took place between March and  
19 April that Mr. Balboa caused through the numbers that he was  
20 passing on to Mr. De Charsonville.

21 What does he say? He is telling Mr. Balboa, "I have  
22 no idea how I can justify these numbers that you had me pass  
23 on.

24 What does Mr. Balboa say? We will get to that later  
25 but here is another example of Gilles De Charsonville in

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Summation - Mr. Cowley

1 September: "Mike, last I sent was this number. What should I  
2 send now?" He is not saying, oh, let me do some research. Let  
3 me go check on this. He is asking Mr. Balboa, give me a  
4 number, tell me what number that I should send.

5 On many cases, Mr. Balboa would learn, literally  
6 within minutes, that the exact value that he passed on to  
7 Mr. De Charsonville was sent on to GlobeOp. Let's take a look  
8 at an example of this.

9 This is the April 2008 valuation. Let's just walk  
10 through this.

11 First, Government Exhibit 861. So it is May 5, 2008,  
12 9:10 a.m. Mr. Balboa says: "On a train. Call in 10 minutes."

13 What happens next?

14 One minute later, Mr. De Charsonville rings back, he  
15 says OK.

16 Then eight minutes after that, consistent with that  
17 sort of 10-minute estimate, a phone call takes place. Here is  
18 the phone call.

19 (Audiotape played)

20 MR. COWLEY: So Mr. De Charsonville, sort of sarcastic  
21 response to that.

22 So what happens after this phone call? One minute  
23 later, Gilles De Charsonville send that number on to GlobeOp.  
24 And after that, four minutes later -- so within about five  
25 minutes of getting off the phone with Mr. Balboa, Mr. De

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Summation - Mr. Cowley

1 Charsonville forwards to Mr. Balboa the email that he sent to  
2 GlobeOp, letting him know that he passed on the exact numbers.  
3 Mr. Balboa is under no delusion that Gilles De Charsonville is  
4 out there trying to come up with an independent price.

5 Also, Mr. Balboa knew the numbers were wrong. Some of  
6 the strongest evidence that you know about that is the offer  
7 email that he gets. He gets offer after offer to purchase  
8 these Nigerian warrants.

9 Government Exhibit 6008, this is a summary chart that  
10 shows all of the email communications, all of the  
11 communications that he is getting with offers for Mr. Balboa to  
12 purchase the Nigerian warrant. What do you notice? The  
13 highest warrant for all of 2008 is \$252.

14 The exhibits, all of these references are down at the  
15 bottom left-hand corner and you can look at them during your  
16 deliberations, but he is getting communication after  
17 communication with offers to purchase these Nigerian warrants.

18 Take a look at Government Exhibit 6011. This is a  
19 comparison of the known trade prices for the Nigerian warrant  
20 with the offers that Mr. Balboa is getting. What do you  
21 notice? They are very much in line. They sort of trend at the  
22 same time. They are angling down at the same time in 2008.

23 If we could go back, Mr. Hattendorf.

24 These are not stale prices. There is an active market  
25 of people that are buying and selling the Nigerian warrant.

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Summation - Mr. Cowley

1 And traders are sending prices to Mr. Balboa that are  
2 consistent with where the market is at. Those are the offers  
3 he is getting in 2008.

4 Now, take a look at 6010. This is a very important  
5 document. This shows down in the blue the offers that  
6 Mr. Balboa was being sent, where those numbers were at the  
7 Nigerian warrant. We are talking about mid 200s. The top  
8 document, the top bar, the orange and the red, these are the  
9 numbers that Mr. Balboa is passing on to Pratt and De  
10 Charsonville. Look at the escalation. Look how different it  
11 is between the offers that he is receiving.

12 This is important. Applying your reason and common  
13 sense, ask yourself, if Balboa thought in September 2008 that  
14 the warrant was worth between 4,000 and 3,000 dollars and  
15 people were giving him an offer to buy this at \$200, you would  
16 snap that up in a heartbeat. You could instantly make like 18  
17 times by buying it at a fraction of what you think it is worth.  
18 But he doesn't. He doesn't buy a single Nigerian warrant in  
19 all of 2008. This shows you that he knows these numbers that  
20 he is passing on are bogus.

21 What else is important about this? You know why he  
22 didn't buy a single warrant in 2008, because if he bought one,  
23 a single one, GlobeOp, the valuation agent, would have gotten  
24 information about that trade. So if a trade came in where he  
25 purchased the warrant say, \$220, what it was actually worth,

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Summation - Mr. Cowley

1 GlobeOp could compare that to the counterparty mark he was  
2 getting at like \$3,000 and that would raise a red flag.

3 Here's what Eammon Greaves had to say about that.

4 "Q Let's say you have that exact situation, you buy it for  
5 like 200 bucks and you have a counterparty mark for like 3,500.  
6 Would that raise any red flags?

7 "A Yes.

8 "Q Explain why and what would happen.

9 "A Because when we are putting together the month end  
10 valuation, we do a check against anything that's been bought or  
11 sold within that month to make sure that the ending value is  
12 within tolerance to any purchase or sales, so that gives us a  
13 point of reference."

14 So he knows he can't do that or he will get caught.

15 Now, you heard a lot of argument about these offering  
16 memos.

17 Could we have Government Exhibit 6008 again.

18 first, you have heard they are not real emails because  
19 they have that language "subject to call."

20 Well, you listened to Federico Sequeira from Exotix.  
21 You listened to Robert Knapp who was with Ironside Partners who  
22 bought the warrant. You know that subject to call does not  
23 somehow make these emails fake in anyway. You also heard that  
24 well a lot was sent to his Bloomberg address and the messages  
25 scroll down. Ladies and gentlemen, the idea that he somehow

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Summation - Mr. Cowley

1 went to the bathroom and missed these offers forever is simply  
2 not believable. You also heard Mr. Knapp talk about the fact  
3 that Bloomberg, like any other email system has a search  
4 function. All that you have to is type in the word "Nigeria"  
5 and any of these offers would have come up.

6 Additionally, he gets a ton of offers sent to his  
7 corporate account. Take a look at Government Exhibit 888 --  
8 these don't even include the "subject to call" language that  
9 they said was such a big deal. So 888, no "subject to call"  
10 language. 1233, no "subject to call" language. 1566, this is  
11 from Phillip Hamilton at Merrill Lynch, no "subject to call"  
12 language. We also see no offers sent to his Millennium  
13 account. Government Exhibit 1014. Government Exhibit 1233  
14 government Exhibit 1159.1.

15 You know what? You know how you know he gets some of  
16 these Bloomberg messages? Because he responds to some.

17 Look at Government Exhibit 808. This is an email from  
18 Patrick Willis of Exotix, April 17, 2008, an offer for numerous  
19 securities including Nigerian Oil rights, all subject to call.

20 What is Mr. Balboa's response? He asked about another  
21 security. He doesn't even think it is important enough to even  
22 ask a question about the Nigerian warrant, even though he is  
23 marking it at multiples of that amount. This would have been  
24 an excellent buy opportunity for him. He doesn't even ask a  
25 question about it. Same thing with an IM exchange on Bloomberg

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Summation - Mr. Cowley

1 with Mr. Phillip Hamilton of Merrill Lynch. Mr. Hamilton gives  
2 an offer for several securities, including the Nigerian  
3 warrant. What does Mr. Balboa do? He asks him about another  
4 security. Doesn't ask him about the Nigerian warrant Phillip  
5 Hamilton follows up with him during the conversation. What  
6 about any of the other offers? Any cares? No response.

7 So you have all of these offer emails and he doesn't  
8 take a single one. Strong evidence that he knows the numbers  
9 are fake. How else does he know? He has access to ALL-Q  
10 numbers that indicate where the market is at.

11 I want to take a step back and talk about this ALL-Q  
12 issue. You heard Mr. Pratt and Mr. De Charsonville say they  
13 couldn't find anything on screen about these ALL-Q numbers.  
14 Then you heard testimony from the Bloomberg witness that sort  
15 of straightened this out.

16 Here is what happens. Brokers like Exotix can put up  
17 ALL-Q numbers on Bloomberg, but they have to grant access to  
18 people to see those numbers. So it makes sense that Mr. De  
19 Charsonville and Mr. Pratt who worked for rival brokers are not  
20 going to be granted access to these numbers by Exotix, but keep  
21 in mind that Mr. Balboa is a client of Exotix. He purchased  
22 Nigerian Oil warrants from Exotix, so it makes sense Exotix  
23 would give him access to these ALL-Q numbers. In fact this is  
24 what Mr. Sequeira said, and he is referring to some of the  
25 ALL-Q numbers.

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Summation - Mr. Cowley

1 "Q That is something that Exotix clients would have access  
2 to?

3 "A Yeah, all our clients would see that."

4 So you know he is getting access to this. And how  
5 else do you know?

6 Look at Government Exhibit 205. So this is an email  
7 that actually Mr. Balboa sends describing the Nigerian warrant  
8 May 30 of 2007. And where does he describe where it is trading  
9 at? Currently around \$240 per warrant. So let's check out  
10 what Exotix ALL-Q numbers say for these dates.

11  
12 (Continued on next page)

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Summation - Cowley

1 MR. COWLEY: Look, between 238 and \$243. He has  
2 access to these numbers. He has access to the numbers that  
3 Exotix was trading on. He's looking at them and that's giving  
4 him a sense of where these numbers are at. He is reporting  
5 that to other people about where he thinks the market is at.  
6 He knows where these Nigerian oil warrants are being traded and  
7 he's grossly over trading the value month end and month out.  
8 You've seen the documents. You know that there is not any  
9 collateral linked to the warrant. The payments of the warrants  
10 will not be secured by any collateral. The language cannot be  
11 more simple. You've also heard from a director of the World  
12 Bank in the form of Finance Minister of Nigeria that no  
13 collateral as related to the Nigerian warrants. It is not  
14 collateralized. You heard that from John Oshilaja. What did  
15 he say? No, the Nigerian oil warrants were not collateralized  
16 in any form. They are totally unsecured obligations. You  
17 heard that from Robert Knapp. Was there any collateral count  
18 from Nigeria warrant? No, there is none.

19 Now, the defense called Dr. Muhtar back to the stand  
20 to talk about something called the excess crude account. Make  
21 no mistake that had absolutely nothing do with the Nigerian oil  
22 warrant. Here is what Dr. Muhtar said about that.

23 Dr. Muhtar, it's true the access crude account had  
24 absolutely nothing at all to do with the Nigerian oil warrant,  
25 is that correct?

DCHAABAL2

Summation - Cowley

1 Answer: That's correct.

2 All it says is the same account that the government of  
3 Nigeria that by the way was created over a decade after the  
4 Nigerian oil warrants for a period. It is in no way relevant  
5 to this at all. Expenditures are made out of this all the  
6 time. They use that money for budget shortfalls, power plants,  
7 other infrastructure investments and there is no way that  
8 Mr. Balboa, this expert in emerging markets would somehow think  
9 that's a collateral account in any way, let alone when  
10 affiliated with the Nigerian warrants.

11 Mr. Balboa knew how these securities operated. He  
12 knew that cause he was an expert in the field. You actually  
13 see e-mails he is receiving explaining how this security  
14 operates. Let's look at a few. Philip Hamilton from Merrill  
15 Lynch. This is an explanation that he give Mr.~Balboa. The  
16 oil price stays above the strike price and the -- until  
17 November 20. This means the holder would receive a total of  
18 \$290. You see that math ad nauseam. These were numbers that  
19 are being sent directly to Mr. Balboa.

20 Keeping that in mind, look at Government Exhibit 6009.  
21 You have heard a lot of talk about models. That's great.  
22 Portfolio managers do. But the bottom line is you could have a  
23 lot of debate and build a complicated model about whether or  
24 not this thing should be at 220 or 238. Under no circumstance  
25 is your model going to say anything over \$390.

DCHAABAL2

Summation - Cowley

1           Take a look at Government Exhibit 6011. Again, these  
2 are the actual trades that you see. Again, with the offers  
3 that are being sent to Balboa not one of them is over \$252. I  
4 am sure the people involved in these trades have models but  
5 they know nothing is going to be above \$390.

6           Who else knew this? Mr. Balboa himself. How? Let's  
7 look at the e-mail he authors. May 30, 2007 he sends  
8 Ms. Molberg a description of the Nigerian oil warrant. What  
9 does he say? The same thing. He's paid 30 per warrant per  
10 year until 2020 provided the oil price stays above 35. When he  
11 talks about oh, we hope Nigeria does a second buyback, he talks  
12 about it being near 300 per warrant. It's not a thousand or  
13 two thousand or three thousand. He knows there is no  
14 collateral associated with this. In fact, this reference to  
15 the buyback raises an interesting point. Mr. Balboa speaks  
16 volumes about the fact that he knew there was no collateral  
17 associated with these warrants. Let's look at an exchange  
18 between Mr. Dubin and Dr. Muhtar during his cross-examination.

19           Mr. Dubin asked him, in preparation for your testimony  
20 today did you determine whether or not Millennium Global  
21 Emerging Credit made a bid during that auction? Do you know,  
22 sir, whether or not? Let me ask you this. As you sit here  
23 today, do you recall saying that the highest bids were actually  
24 much higher within the \$500 range? I don't recall that. Do  
25 you recall, sir, that there were, in fact, bids that exceeded

DCHAABAL2

Summation - Cowley

1 \$500? I would be most surprised if I did. Sir, there were  
2 bids on a whole wide range. OK. There are some people  
3 regardless of whether you recall a specificity how high the bid  
4 went there were bids exceeding the \$220 the Nigeria -- I guess  
5 that would say willing to pay for them. Answer. There were  
6 and we had the breakdowns of bids that were done by our  
7 advisors. Then there is a little bit. We go through the math  
8 get to the 390.

9 This is on March 21, 2007 was instructing to put the  
10 entire amount 2350 to be tendered at \$280, well below 390,  
11 certainly, not above. This shows clearly that Mr. Balboa knew  
12 there was no collateral account. Now, again, speaks volumes.

13 Now, let's move on. Let's assume that Mr. Balboa  
14 somehow thought that there wasn't a price gap or something like  
15 that and oil kept going up, the price of the warrant kept going  
16 up. Again, this is important too. So after the auction on  
17 May 30 when he's talking about the possibility of a second one,  
18 again, he is saying the price would be nearer to \$300 per  
19 warrant. Again, still under the sum of what the total payments  
20 would be. Further evidence that he doesn't think there is any  
21 sort of collateral due the warrant orders.

22 Mr. Tacopina made a representation to you during  
23 openings, the higher the oil prices go equals higher valuation  
24 on these warrants. Let's look at what happens to the price of  
25 oil in 2008. It goes up for a while but it actually starts

DCHAABAL2

Summation - Cowley

1 declining around July of 2008. What happens to Mr. Balboa's  
2 numbers? Well, they keep going up. They keep going up from  
3 July to October even though oil prices go down. That shows  
4 that even if he thought there was a cap or something like that  
5 that it should be still affiliated with oil prices, right? But  
6 instead, oil starts to plummet. It starts to decline. The  
7 numbers that Mr. Balboa feeds to Mr. Pratt and Mr. De  
8 Charsonville they keep going up.

9 Another example, this is the final marks with oil  
10 still going down. Now, if your recall during Mr. Howards'  
11 cross-examination they shifted the chart back to suggest there  
12 was some sort of six month lag time, right? You know that that  
13 formula about how you can figure out each payment price is  
14 important, that references only how that one pay period works,  
15 right, about whether or not the next payment is going to be  
16 somewhere between zero and \$15. It doesn't have anything to do  
17 with the overall valuation of the security. And that makes  
18 sense, right? If you are thinking I'm a warrant holder. I  
19 need to figure out what are the chances that all of my payments  
20 of this in the future are going to hit \$15? Well, oil's going  
21 down so that's, obviously, going to impact that. You don't  
22 have to take my word for it. Mr. Howard explained this.  
23 Mr. Knapp who's traded in Nigerian warrant explains this.  
24 Again, strong evidence that he knows that his numbers are  
25 complete bogus.

DCHAABAL2

Summation - Cowley

1           How else do you know that Mr. Balboa is committing  
2 fraud? His authorization of one counter-party. Now recall  
3 that in January to about April both his co-conspirators are  
4 involved, Sam Pratt and Gilles De Charsonville. They are both  
5 passing on his numbers to GlobeOp. Then there comes a point  
6 where Mr. Pratt says he doesn't pass on any numbers any more.  
7 So after that you know you are supposed to get two  
8 counter-parties. That's what the documents say.

9           Here is the DDQ. It talked about what a portfolio  
10 manager's responsibilities were, that if the portfolio  
11 manager's aware of second counter-party that was available what  
12 are GlobeOp's expectations as to what he should do? That he  
13 should provide secondary contact for that counter-party. What  
14 does he do starting in May? He approves one counter-party  
15 mark, just Gilles De Charsonville and does he it again in June.

16           Now, recall Mr. Balboa's receiving offer after offer  
17 from people in 2008, people that can serve as counter-parties  
18 that are trading this security. Let's take a look at some  
19 examples. These are all the offers Philip Hamilton from  
20 Merrill Lynch, Philip Hamilton is actually serving as  
21 counter-party mark for other securities in Mr. Balboa's fund.  
22 He doesn't direct them. Philip Hamilton doesn't direct them to  
23 Patrick Willis from Exotix. Doesn't direct them to Federico  
24 Sequeira. Mr. Balboa actually bought warrants from UBS. Look  
25 at Defense Exhibit F, UBS is serving as a counter-party. He

DCHAABAL2

Summation - Cowley

1 isn't directing them, no, he approves one counter-party mark.  
2 He doesn't direct GlobeOp to a second counter-party mark. Why?  
3 Because he wants to control the flow of information. He knows  
4 that Sam Pratt was willing to do this for him. Gilles De  
5 Charsonville was able to do this for him. Federico Wouldn't.  
6 Maybe Philip Hamilton would. Maybe somebody from UBS not. He  
7 knows that if he introduces another counter-party the scheme  
8 could be up. And you don't have to speculate about this cause  
9 that's exactly what happened.

10 Take a look at Government Exhibit 1291. So GlobeOp  
11 implements now a system in October 2008 and Balboa loses  
12 control of directing which counter-party marks GlobeOp should  
13 go to for his funds. They reach out to guess who? Exotix and  
14 UBS. And what numbers do they give? 190 mid and 180 mid.  
15 These are literally a fraction of a number that Mr. De  
16 Charsonville is passing along around 3500 mid.

17 Instantly, by GlobeOp making it decision \$80 million  
18 of fake value in Mr. Balboa's fund disappears. Right through  
19 that. And the fund for whatever reason goes into liquidation.  
20 He wasn't able to keep this scheme going for bonds by approving  
21 one counter-party. Recall the conversation Mr. Pratt has with  
22 Mr. Balboa you need to find somebody else to do it. He says I  
23 am looking. He knows there are other people trading in this  
24 security. That's how he kept this scheme going.

25 Now, I also want to talk with you about sort of

DCHAABAL2

Summation - Cowley

1 another issue relating to oversight capacity which is this idea  
2 correcting errors, OK. Some of the things you saw was  
3 Mr. Balboa having interactions with GlobeOp where, for example,  
4 there's like 128 trillion error where and Mr. Balboa finds it  
5 so that is him showing good faith. Ladies and gentlemen, these  
6 are errors that were going to be detected 128 trillion is the  
7 multiple of U.S. national debt. Don't confuse that for a  
8 second Mr. Balboa's trying to do the right thing. You contrast  
9 that with the Nigerian oil warrant. Really at the end of day  
10 between January and October of 2008 Mr. Balboa is the only  
11 source of information to GlobeOp for the Nigerian oil warrant  
12 he was hiding behind Mr. Pratt and Mr. De Charsonville but at  
13 the end of the day he is the only source of information and he  
14 is using that to manipulate the process and directly inflate  
15 the fund's NAV.

16 You know how else do you know that Mr. Balboa was  
17 committing fraud? His massive coverup efforts when Millennium  
18 and regulators started looking into things. So let's start in  
19 2008. Now, Mr. Balboa's is helping to create lies to coverup  
20 his scheme even with GlobeOp. Let's take an example. Would  
21 GlobeOp asking questions about things. Do you recall 6001?  
22 This shows the number that Mr. Pratt and Mr. De Charsonville is  
23 passing on to GlobeOp. That raises some questions for GlobeOp  
24 and they reach out to De Charsonville about it. Here's what  
25 they ask. Gilles, we would like to confirm the Nigerian oil

DCHAABAL2

Summation - Cowley

1 warrant prices again since they different way too much from the  
2 last time. He passes this along to Mr. Balboa. GlobeOp didn't  
3 get to see this. They were expecting an explanation to come  
4 from the independent counter-party, so he reaches out. They're  
5 asking for a justification. I have no idea. Again, clearly  
6 showing Mr. Balboa that Mr. De Charsonville isn't getting the  
7 prices for himself. He has no idea. Mr. Balboa says just say  
8 the price of oil is up. There's no nonsense about that. He is  
9 saying just say oil prices went up. What happens? Perfect.  
10 Great. And he passes that right along. Confirmed the asset  
11 oil prices up tremendously. GlobeOp thinks they are getting an  
12 explanation when in reality Mr. Balboa is helping with the  
13 cover story.

14 Let's talk about post liquidation conduct. Mr. Balboa  
15 later in 2010 Millennium starts looking into this valuation  
16 issue and Mr. Balboa provides written explanation to Millennium  
17 about how these warrants could be valued at numbers they were  
18 valued at. Government Exhibit 1535, ladies and gentlemen, is  
19 literally chocked full of lies. I am going to spend some time  
20 walking through some of the things you know are lies because  
21 you have been hearing from witnesses and seeing the documents  
22 that show the truth.

23 The first lie, so he writes at time of its creation of  
24 idea that the collateral account oil trust account never  
25 occurred to anyone but whatever original warrant document

DCHAABAL2

Summation - Cowley

1 transfers of the right of oil trust to holders. Well, you know  
2 the truth. You've looked at the offering memorandum. There is  
3 no reference to any sort of oil trust account in that. It says  
4 the payment of warrants will not be secured by any collateral.  
5 You recall even for bond that was collateralized that was U.S.  
6 Treasury obligation that this had nothing to do with oil one  
7 way or the other. You also know there was no collateral  
8 existed for the bonds after late 2006 when bonds were paid off,  
9 no collateral exist for 2007 for anything and no oil trust --

10 Dr. Muhtar said we never had an oil trust account or  
11 collateral account. It's not collateralized. They called Dr.  
12 Muhtar back to talk about the crude account, not a collateral  
13 account, nothing to go with the Nigerian oil warrant. You know  
14 what else is true about the warrant. It wasn't created until  
15 2004, the warrants. The bonds were issued in 1992, a decade  
16 previously. There is no way there could be a reference to  
17 Mr. Balboa relying on cause this wasn't created until over a  
18 decade later and it's not a collateral account in any way,  
19 shape or form.

20 What's another lie? After this auction -- to this  
21 warrants became restricted and the government starts to solicit  
22 auctions from local Nigerian groups start to broker deals.  
23 What's the truth? After this auction did the Nigerian  
24 government start to solicit offers from big holders on the  
25 warrant? No. That was never even contemplated. That's from

DCHAABAL2

Summation - Cowley

1 the former Finance Minister of Nigeria and the former head of  
2 the Debt Management Office. You know that is a totally lie.

3 Next. So in November of 2007 Millennium was contacted  
4 by a local Nigerian named John Oshilaja wanting to partner up  
5 around the idea of selling large blocks to the government at a  
6 thousand or two thousand dollars or more given the over  
7 collateralization of oil account. Well, you'll hear from  
8 Mr. Oshilaja you guys have no dog in this fight, whatsoever,  
9 and he came here and he is asked whether or not that statements  
10 was true and what did he say? It was totally false.

11 Mr. Oshilaja had interacted with Millennium early that year but  
12 those discussions were over by May, June and never any  
13 discussions about buyback relating to Nigerian warrants,  
14 totally false.

15 So just going along with that same lie, so at that  
16 time this would be like November 2007 we tried to buy warrants  
17 in the market below four hundred dollars but were unsuccessful  
18 as supply was so small. You know that is a lie because you've  
19 seen the e-mails that he is getting with offers. Let's take a  
20 look at a few. November 8, 2007 to Michael Balboa, Nigeria  
21 it's offered at 230 to 235. Here's another one November 26,  
22 2007, the warrants are offered at 234. Another one,  
23 December 12, 2007 again offered at 234, well below \$400. Here  
24 is another one December 12, 231 to \$235 is what the bid ask  
25 range is well below \$400.

DCHAABAL2

Summation - Cowley

1           Here is Government Exhibit 600 which shows a summary  
2 chart all of the offer communications getting in 2008. He  
3 doesn't respond to a single one even inquiring about the  
4 Nigerian oil warrant despite the fact that he's respecting to  
5 Millennium later that we couldn't find any warrants under four  
6 hundred dollars. You now know that is totally.

7           Also keep in mind Government Exhibit 2004. So in  
8 March of 2007 he puts in an offer at the auction at \$280.  
9 Again, he is a trying to sell these things back in the Nigerian  
10 government and well below four hundred dollars. It shows he'  
11 lying when he's talking to Millennium later.

12           Again, Nigerian government trying to buy private block  
13 warrants. That's a lie. You heard that from Dr. Muhtar. The  
14 Nigerian government ever try to buy these warrants back over  
15 the maximum payout amount? That certainly wouldn't make sense  
16 to anybody.

17           What else? There's other representations made, not  
18 just about John Oshilaja or what the Nigerian government's  
19 doing. He describes other investors that are in similar  
20 situations. He references this guy Nick Corby he describes him  
21 also a hold out of significant size meaning this is somebody  
22 else holding onto a lot of these Nigerian warrants. He is  
23 expecting a big pay out or a second buyback. Well, the records  
24 from Bridge Asset Management are in evidence. This is  
25 Government Exhibit 5019. Bridge Asset Management LLP since its

DCHAABAL2

Summation - Cowley

1 incorporation in 2007 has never traded, held or had any  
2 involvement with the following assets. What's included? The  
3 Nigerian warrant. Another lie.

4 What else? The over-collateralization of the oil  
5 warrants account can be seen on Bloomberg. As of 2008 this  
6 already reached approximately five hundred per warrant. You  
7 know this isn't true. You heard from the Bloomberg witness.

8 How else do you know it wasn't on Bloomberg? One the  
9 categories of information that was on Bloomberg at the time  
10 about the Nigerian oil warrant was this category is unsecured.  
11 And the answer yes. This security is unsecured. You heard  
12 from Luongo testify that this page was on Bloomberg in 2008.  
13 You know there's no representations that it was secured in any  
14 way, shape or form.

15 You might look at the list of payments that shows if  
16 you recall sort of the formula being crunched and then saying  
17 subject to a cap. It has nothing to do with collateral any  
18 way, shape or form. It's just information that Bloomberg has  
19 put on saying these are what the formula said and it's subject  
20 to a cap. Nothing to do with collateral.

21 This is the secured indicator that Mr. Luongo was very  
22 competent in 2008. What does it say? No, the security is  
23 unsecured i.e. no collateral. So you know that's a lie as  
24 well. It doesn't end there, ladies and gentlemen. He passes  
25 on his lies to Mr. De Charsonville so they can get on the same

DCHAABAL2

Summation - Cowley

1 page, so they he can tell the same story to regulators,  
2 Millennium, anybody who asks. You have that in documentary  
3 evidence. Here is an e-mail that Mr. Balboa sends to Mr. De  
4 Charsonville wife's account and passes on the same story.  
5 Again, why? To get the stories straight. So they're saying  
6 the same thing.

7 What does Mr. Balboa send Gilles De Charsonville? A  
8 Fed Ex package of the damning e-mail so Mr. De Charsonville can  
9 review them. Fed Ex package that shows that. Ms. Molberg  
10 recognized Mr. Balboa's signature on that Fed Ex package. Sure  
11 enough what happens? Mr. De Charsonville goes into his meeting  
12 with regulators in Madrid and he starts telling lies, starts  
13 telling the cover story but he didn't count on something, the  
14 fact that they had recorded phone calls from his office. When  
15 they referenced fact that they have these calls Mr. De  
16 Charsonville stops the interview and leaves.

17 Now, we've talkeded about Mr. Pratt. We have talked  
18 about Mr. De Charsonville. You've also seen a video deposition  
19 of Mr. Nesti. Now I want to talk about that for a moment. So  
20 an eerily similar pattern plays out with Mr. Nesti.  
21 Mr. Balboa -- he should expect a fax from Nesti. Well, let's  
22 see what Millennium didn't see. Balboa e-mails Leonardo Nesti.  
23 This the same Leo Nesti from Greenwich days? What does  
24 Mr. Balboa ask? He again asks a favor of someone and what's  
25 that favor? To pass on a fax to Millennium. You have e-mail

DCHAABAL2

Summation - Cowley

1 correspondents documents. So Mr. Balboa sends -- first they  
2 ask him for a personal e-mail in the file from his Gmail  
3 account, sends to Mr. Nesti Yahoo account. If possible send  
4 the e-mails as separate documents, that would be great. If  
5 not, just fax to the fax number on the letter. Thank very much  
6 in advance, Mike.

7 What happens after that? He also instructs them that  
8 what happens if you are contacted about the fax? He suggested  
9 to me not to mention about the fact that he give me this fax.  
10 Do not tell them that this came from me. That's what's going  
11 on here.

12 And you know just take a step back. You watched that  
13 video deposition of mr. Nesti. The idea that Mr. Balboa would  
14 sit across from -- from Nesti and be like this guy is going to  
15 know a lot about the Nigerian oil warrants, not Federico, not  
16 Philip Hamilton, not UBS, not any of these institutions that I  
17 deal with all the time. I am going to call Nesti up who I  
18 haven't had a business interaction with in almost a decade and  
19 this is the guy who I can trust to send in these numbers for  
20 Nigerian oil warrant. Ladies and gentlemen, that is  
21 unbelievable. Just unbelievable. What happens? Mr. Nesti  
22 sends in the fax with the numbers. Once again, it doesn't  
23 work. Millennium contacts Mr.~Nesti and he quickly says that  
24 the numbers didn't come from him. He came from Mr. Balboa.

25 At the end of the day who does Mr. Balboa try to

DCHAABAL2

Summation - Cowley

1 contact again? Mr. Nesti. Mr. Nesti doesn't want to speak to  
2 him. Who else does he try to contact around then? Mr. Pratt.  
3 You saw that text message you saw in the e-mail. Mr. Pratt  
4 doesn't want to speak to him. Mr. Balboa is losing control of  
5 the flow of information and he can't cover up his scheme any  
6 more. So that cover up evidence is strong evidence that  
7 Mr. Balboa knew exactly what he was doing was wrong. If he  
8 thought, oops, I got this one wrong or something like that  
9 would he be going through these massive efforts to cover up and  
10 come with cover stories for what he did? Absolutely not.

11 Briefly, ladies and gentlemen, before I sit down I  
12 want to talk about the charges. Mr. Balboa is charged with  
13 five counts, two counts of conspiracy. Conspiracy to commit  
14 securities fraud. Conspiracy to commit wire fraud. Now the  
15 Court will give instructions and I anticipate that what it will  
16 tell you is you don't need some sort of solemn pact to find a  
17 conspiracy. You just need to find that Balboa reached an  
18 understanding to do something wrong. The evidence that you see  
19 with the testimony of Mr. Pratt and Mr. De Charsonville, the  
20 e-mail communication involving Mr. Balboa, the audio recordings  
21 involving Mr. Balboa, these things show you a conspiratorial  
22 agreement. Those clearly show an explicit understanding. And  
23 what else? The wire fraud, let's talk about that for a moment.  
24 All wire means is sending an e-mail communication or  
25 transferring funds something like that, OK. That's what a wire

DCHAABAL2

Summation - Cowley

1 communication is.

2 I am now going to talk about the substantive counts.  
3 All of these show is a scheme to defraud. That means telling  
4 somebody a lie in order to get money from them, all right. If  
5 the wire fraud, again, you see example of e-mails being sent,  
6 these newsletters being sent here right here into Manhattan.  
7 You see examples of financial transfers coming into the bank  
8 account in Manhattan.

9 In term of securities fraud what that is is the  
10 security at issue is the investment in Mr. Balboa's fund,  
11 investors buying shares in Mr. Balboa's fund. He's doing a  
12 scheme to defraud in relation to purchase or sale of that  
13 security.

14 And finally investment advisor fraud that count  
15 alleges that Mr. Balboa committed a scheme that we discussed  
16 in -- he serving as the investment advisor.

17 So at the end of the day Mr. Balboa had a choice. In  
18 2008 he could have told the truth. He could have marked the  
19 Nigerian warrant or he could have let the independent process  
20 play out, he could have had independent counter-parties but  
21 instead he chose to lie. He chose to undermine that valuation  
22 process. He chose to inflate the valuation that warrant. He  
23 made that choice to commit fraud and you should hold him  
24 accountable for that choice.

25 And as you consider all of the evidence, I

DCHAABAL2

Summation - Cowley

1 respectfully ask you to do what Mr. Miller said at the  
2 beginning, use your reason and your common sense. At end of  
3 the day when you use that reason and your common sense we  
4 submit to you that you'll find the only verdict that's  
5 consistent with the verdict, that all your common sense is a  
6 verdict of guilty on all counts.

7 THE COURT: Thank you, Mr. Cowley. We'll now take our  
8 morning recess. We'll resume in 15 minutes.

9 (Jury not present)

10 THE COURT: OK. We'll start at quarter of 11.

11 (Recess)

12 THE COURT: Be seated.

13 Marlon, get the jury.

14 (Jury present)

15 THE COURT: Please be seated.

16 We'll now hear the summation on behalf of Mr. Balboa.  
17 Mr. Tacopina.

18 MR. TACOPINA: Thank you very much.

19 Good morning, ladies and gentlemen.

20 First of all, I think it's appropriate for both sides  
21 to just give my appreciation and thanks to all of you for your  
22 service here. It was a little longer than, obviously, we had  
23 promised you it would be. So your commitment obviously and  
24 dedication to this important task is something that both sides  
25 I have to tell you I appreciate greatly. So, thank you for

DCHAABAL2

Summation - Tacopina

1 that.

2 Judge Crotty instructed you at the end of every day  
3 before you all left to keep an open mind. He keep saying that.  
4 Keep an open mind. You heard from the beginning of the case  
5 that Mr. Balboa is entitled to a presumption of innocence.  
6 Those aren't just words. Judge Crotty will give you the  
7 instruction on law when we're done here but he sits here an  
8 innocent man unless and until proven beyond a reasonable doubt  
9 of his guilt and that couldn't be more poignant and more  
10 important than at this very moment right now. And if over the  
11 course of the next couple hours you hear something that I said  
12 that gives you pause that causes you to say, you know what,  
13 he's right, you know what I forgot about that or that doesn't  
14 make sense, something along those lines, those are breathing,  
15 living manifestations of a reasonable doubt.

16 You'll recall some of witnesses in this case, witness  
17 after witness coming in here answering questions by the  
18 prosecution on direct with ease and when it came time to  
19 cross-examination questions by defense counsel, those same  
20 witnesses who had no problem answering questions whether on an  
21 important matter or insignificant one, it was like pulling  
22 teeth to get an answer.

23 And from Ms. Gibson-Stark not agreeing to the simple  
24 when Mr. Dubin was down on his knees with that chart that  
25 simple proposition about the unchanging value of the Nigerian

DCHAABAL2

Summation - Tacopina

1 oil warrant and how that would not, obviously, cause the NAV,  
2 the net asset value of the fund to get up in that three month  
3 period where the Nigerian oil warrant didn't move, it took a  
4 half hour to get that answer from her to Mr. Keswani  
5 intergalactic response to something it's almost as if this were  
6 a game and they were trying to win. This is not a game,  
7 obviously. This is the man's future, Mr. Balboa, hangs in the  
8 balance. It is not a game at all.

9 What that is supposed to be is about, whether they can  
10 prove it with real facts, not conjecture or speculation, real  
11 facts, credible evidence his guilt beyond a reasonable doubt  
12 and I tell you that cannot. I am going to take you through the  
13 evidence and show you where the reasonable doubts lurk  
14 throughout.

15 Someone looked at Michael Balboa's numbers, his  
16 valuations long after the fact, years after the fact and  
17 thought they were wrong and jumped to a conclusion he must have  
18 somehow inflated them fraudulently. And that of course was in  
19 the midst of a ton of litigation, in the midst of finger  
20 pointing, of someone trying to blame someone else, lawsuits  
21 flying around between Millennium, GlobeOp, investors over the  
22 collapse of the fund even though that collapse had nothing to  
23 do with the Nigerian oil warrant at all. So they needed a  
24 scapegoat. And who better than the fund manager, the portfolio  
25 manager?

DCHAABAL2

Summation - Tacopina

1           What then happens is regulators, authorities then come  
2 after these counter-parties, De Charsonville and Pratt, and  
3 what both said repeatedly from day one is that they did nothing  
4 wrong. But the government obviously didn't like that answer,  
5 so it gave them a choice, to say you've done nothing wrong and  
6 you get prosecuted like him or agree that in your opinion some  
7 sort of scheme and you get a non prosecution agreement and you  
8 don't go to jail. You don't have to plead guilty and you get  
9 to walk away, keep the license, nothing.

10           So what were they going to do after years of denying  
11 they had done anything wrong? Both said to you they were  
12 scared to death when they read that criminal complaint against  
13 Mr. Balboa. So they took the prosecution up on their offer,  
14 obviously, and they said they did something wrong with  
15 Mr. Balboa to get their free pass and that's why he's here at  
16 that table.

17           We're going to go through the evidence and see why De  
18 Charsonville and Pratt's trial testimony doesn't prove beyond a  
19 reasonable doubt Michael Balboa's guilt. To the contrary, what  
20 it shows is innocent states of mind in 2008 at the time --  
21 innocent states of mind across the board. There was no scheme  
22 to defraud anyone and there was no crime. And you know that's  
23 why investor, two investors in this fund, the supposed victims  
24 in this case, two of them came in here, halfway across the  
25 world. You saw one live. One we read to you to speed this

DCHAABAL2

Summation - Tacopina

1 thing up a little bit. They came in here who actually lost  
2 money to testify on Michael Balboa's behalf. If that's not a  
3 resounding endorsement of his innocence, nothing else is.  
4 These are the so-called victims who came in here to testify on  
5 behalf of Michael Balboa.

6 You know Mr. Cowley repeated this tag line throughout  
7 "secret and forbidden" or "secret and hidden agreement". There  
8 was nothing secret and hidden in 2008. This was open and  
9 notorious as you can get. And if you load a question up,  
10 Mr. Charlesworth, you are not allowed to be secret and hide the  
11 fact that you are giving prices. Well, of course, you are not  
12 allowed to do that. That is not what happened here, folks.  
13 That's not what happened by a long stretch. And we are going  
14 to go through some of the evidence. I am going to give you a  
15 little preview.

16 One thing we have to get straight is one rule of law  
17 the judge is going to instruct you about that is important  
18 because it's not something we deal with in our daily lives or  
19 walk around doing when we're interacting with our kids. We  
20 don't apply proof beyond a reasonable doubt when our kids have  
21 done something. You make a decision, you are not going to give  
22 them that standard. But what I am here to do is help point out  
23 the numerous reasonable doubts that lurk in this evidence. And  
24 it's not just reasonable doubts, ladies and gentlemen, which is  
25 all you need by the way, one. These are major doubts, some

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Summation - Tacopina

1 serious major doubts, any one of which is enough to acquit  
2 Mr. Balboa on all counts. And the judge is going to instruct  
3 you about this idea of reasonable doubt, proof beyond a  
4 reasonable doubt and what that means.

5 By the way, that seems to have served us very well in  
6 this country. The people who founded this country, certainly,  
7 no stranger to controversy, no stranger to social dangers,  
8 having created, they figured our foundering fathers that the  
9 best way to secure the liberties and guarantee the liberties of  
10 the citizens was to make sure that if the government brought  
11 charges they were proved and not just by a preponderance of the  
12 evidence but by the highest standard the law permits, proof  
13 beyond a reasonable doubt.

14 Proof beyond a reasonable doubt isn't that, he may  
15 have done this. It's not, he probably did this. It's not, I  
16 am also certain he did this. It's there's no reason to doubt  
17 he did this. In this case you have dozens of reasonable  
18 doubts, one of which is enough. The government has brought  
19 these charges in here and they have a heavy burden and that's  
20 why they get to sum up first and that's why they get to go  
21 after I go.

22 And the five charges that Mr. Balboa is accused of in  
23 sum and substance is this conspiracy to commit securities  
24 fraud, wire fraud. You are going to get a verdict sheet with  
25 all this on it. So then the securities fraud and the wire

DCHAABAL2

Summation - Tacopina

1 fraud without the conspiracy element and then this investor  
2 advisor fraud. It sounds like a lot but it really boils down  
3 to the same thing. They allege Michael Balboa defrauded  
4 investors by interacting with counterparts. They allege that  
5 he did that as part of some scheme to falsely overvalue the  
6 Nigerian warrant, that he tried to cover up the scheme and they  
7 did so in a conspiracy with others.

8 Let's go through some of the evidence now in detail  
9 starting with the prosecution, the claim that Balboa  
10 manipulated the valuation process.

11 Michael Balboa was allowed to be part of this  
12 valuation process and to tell others what he believed his  
13 prices were, especially, especially and distinctly with  
14 illiquid securities. You can't lump everything into one  
15 pattern. Liquid securities and illiquid securities are two  
16 different beasts all together. And that's exactly by the way,  
17 what investors were told exactly. Michael Balboa -- and you  
18 saw some of the offering memorandums. Let me show you one of  
19 them. Government Exhibit 1A page 12, we saw this time and  
20 again, has a separate section, folks, in this offering  
21 memorandum for illiquid portfolio investments, not just the  
22 regular investments of the fund. There was a separate section  
23 for illiquid portfolio investments, investments which is under  
24 its risk section. You'll have all of this. There we've seen  
25 this language up there. But when we're talking about illiquid

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Summation - Tacopina

1 securities that aren't being actively traded you can take into  
2 account things that just aren't out there. Well, at that point  
3 when it's appropriate, where it's appropriate for instance for  
4 illiquid securities, directors or their delegates you involved  
5 in the valuation.

6 Maria Gibson-Stark tried to tell you that the delegate  
7 meant GlobeOp. That is not true and you know that's not true  
8 why? Let's look at this flow cart. This is the offering  
9 memorandum for March 3 of 2008. If you look at page one it  
10 identifies the valuation agent as GlobeOp right away. On page  
11 nine it defines GlobeOp as the valuation agent in parens. Then  
12 on page 12 of this document the valuing illiquid securities a  
13 special section what it does there is it discusses illiquid  
14 securities and how it would be priced and does not define the  
15 delegate as valuation agent, nor does it ever refer to GlobeOp  
16 as the delegate. And you are looking right there. It would be  
17 very easy if they wanted to identify the delegate as the  
18 valuation agent for GlobeOp to do so. They did it before. And  
19 every time we brought this up, every time we brought this up  
20 what the prosecution did is showed you so some provision and  
21 tried to go and make you think that, well, here's who the  
22 delegate is. They went 28 pages down in this exhibit. We're  
23 on page 12 talking about illiquid securities. Let's look at  
24 that on page 40. What it says there is the directors have  
25 delegated the valuation agent to determine the net asset value.

DCHAABAL2

Summation - Tacopina

1 Ladies and gentlemen, that doesn't define the  
2 valuation agent as the delegate or a delegate. It doesn't deal  
3 with the pricing of illiquid securities at all here. It simply  
4 uses the word "delegated" and it says the fund has delegated  
5 the valuation agent to determine the NAV, net asset value,  
6 which is something completely different than what's on page 12  
7 which is the part where it's discussing illiquid securities.  
8 So -- end of month value of entire portfolio than valuing what  
9 that shows. If they wanted to delegate something to GlobeOp in  
10 this document here if they want to they know how to do it.  
11 They did so on page 40. And what's also important and that's  
12 why by the way, they also didn't do on page 12. This is such  
13 an important document because it shows you that the delegate of  
14 the directors of this fund that was Michael Balboa as you'll  
15 hear and first from Mr. Charlesworth to name a few, had the  
16 ability on illiquid assets to be involved in the pricing in the  
17 fair value, OK. And the prosecutors worked so hard on this  
18 because they understand how devastating this is for their case,  
19 devastating.

20 The testimony of Charlesworth, Anthony Warners,  
21 Ms. Molberg who was here, Warners was one who was read in, more  
22 importantly showed you that illiquid securities would clearly  
23 be the exception to the rule. Mr. Charlesworth said who did  
24 you understand the delegate to be? That would be the Michael  
25 Balboa. That's an investor, not someone who is his friend. He

DCHAABAL2

Summation - Tacopina

1 didn't know Michael Balboa except that he used to invest with  
2 him, never socialized with him. He lost a lot of money. He  
3 came here from the UK to sit in the witness stand and testify  
4 on Michael Balboa's behalf.

5 Millennium's marketing and client relations  
6 representatives came here also as defense witness, Ms. Molberg.  
7 She's the one who interacted with the investors. And she told  
8 you that the delegate did not mean GlobeOp either. In fact,  
9 GlobeOp corroborated Ms. Molberg when Mr. Graves came in here  
10 from GlobeOp and read that exact same language I just showed  
11 and said that that language did not say the directors' delegate  
12 GlobeOp at all. Mr. Graves from GlobeOp agreed with that.  
13 It's in the testimony. You can have a read back of anything  
14 you want. I say something to you and you doubt it you could  
15 look at the transcript it's going to be there.

16 (Continued on next page)

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DCHUBAL3

Summation - Mr. Tacopina

1 MR. TACOPINA: The language is so plain on its face  
2 that we just saw. It meant any delegate that the directors  
3 choose, and who better for the directors to choose as their  
4 delegate than the person who knew the most about illiquid  
5 securities, the portfolio manager, Michael Balboa -- the same  
6 portfolio manager -- by the way he was the portfolio manager,  
7 let's be clear, for the Millennium Global Emerging Credit fund  
8 that retained the oversight capacity to insure fair pricing of  
9 assets. That's exactly what investors were told in the due  
10 diligence questionnaire, and that is 9.6.1. We saw this.

11 If you look at these two sections they seem to be  
12 inconsistent on their face. It doesn't mean that something is  
13 being hidden. No assets valued in-house. GlobeOp Financial  
14 Services is the valuation agent, but the portfolio manager for  
15 Millennium Global Emerging Credit, Michael Balboa, retains  
16 oversight capacity to insure fair pricing of assets. We are  
17 dealing with illiquid securities. It is clear as day. That's  
18 what he has the ability to do.

19 I am going to show you a living example of this  
20 shortly, a living example coming from the investors own files.  
21 That's exactly what Karoline Molberg told investors, what she  
22 said she told investors.

23 And why was Mr. Balboa given the oversight to insure  
24 fair pricing of assets in this emerging credit fund because the  
25 securities in his fund, in large part, were illiquid. You

DCHUBAL3

Summation - Mr. Tacopina

1 heard that from Charlesworth, someone who was against the rest  
2 of the market who had this whole different theory. Warnaars  
3 said that too, why Balboa was so important to them in their  
4 minds -- these very experienced hedge fund managers and  
5 investors. He was the one portfolio manager in these illiquid  
6 securities that aren't readily available and pricing all over  
7 the place and there is no mark for them. It is the portfolio  
8 manager who is going to know most, who was involved in the  
9 pricing of these things and that's what happened.

10 You heard prior testimony from an overseas witness,  
11 Mr. Warnaars, the investor. We read his testimony in. Anthony  
12 Warnaars told you -- that's what it is, he told you, that's his  
13 sworn testimony -- he lost 5 million of his own personal  
14 dollars. He is the unique investor in this case, unlike  
15 everyone else who was investing other people's money and funds'  
16 money. He lost 5 million of his own money.

17 And Warnaars what he also told you, he had his own  
18 team investigate the liquidation of that fund and what happened  
19 after he lost his \$5 million, put his own due diligence team in  
20 there to investigate why that fund went down and what happened.

21 After that investigation was complete, Anthony  
22 Warnaars flew halfway away the world a few months earlier to  
23 testify under oath on behalf of Michael Balboa, portfolio  
24 manager, who was overseeing the fund where he lost \$5 million  
25 of his own dollars. And he came in here and said to you, you

DCHUBAL3

Summation - Mr. Tacopina

1 he didn't think Balboa did anything wrong and he investigated  
2 it. That is someone, not a motive -- he has anti-motive.  
3 Clearly, he said, I was upset I lost the money. We  
4 investigated. I investigated it. I am here as a subpoenaed  
5 witness telling you I don't believe he did anything wrong,  
6 despite the fact that he lost his money.

7 He expected Balboa to be involved in the pricing of  
8 these illiquid securities. They were complicated, the pricing.  
9 They were thinly traded. The prices were not out there.  
10 Couldn't take a few trades if someone was doing over the course  
11 of the year and say that is the market price the documents  
12 explain that.

13 You heard from Molberg, Charlesworth, others who told  
14 us, illiquid securities are different than liquid securities.  
15 Liquid securities have hundreds of trades a minute; illiquid  
16 securities like the Nigerian warrant could have hundreds of  
17 trades a year. That's why you can't get that comfort in those  
18 hundreds of trades a year that's the market value, and that's  
19 something that Millennium warned investors about.

20 And Government Exhibit 3002, this is an offering  
21 memorandum that dealt with that specific thing, valuation and  
22 liquidity of instruments.

23 The last two sentences: Due to the lack of adequate  
24 secondary market liquidity for certain securities, the  
25 investment manager may find it more difficult to obtain

DCHUBAL3

Summation - Mr. Tacopina

1 accurate market quotations for the purpose of valuing the fund  
2 and calculating the NAV. Market quotations may only be  
3 available from a limited number of sources and may not  
4 represent firm bids for actual sales.

5 Millennium warned the investors about these assets in  
6 that fund, warned that those market prices are not readily  
7 available and, if they are, they may not represent real prices  
8 or real bids. When you read that and understand what the  
9 investors were told prior to making an investment, that is  
10 exactly what happened here. It is exactly what happened. The  
11 illiquid securities were different and more difficult to value.  
12 Michael Balboa's input into the valuation as an expert in  
13 emerging markets was necessary and demanded -- at least by the  
14 investors who understood what they were investing.

15 The prosecution kept pointing to language in documents  
16 that the independent counterparties and independent valuation.  
17 They brought in witnesses here. Three investor witnesses --  
18 none of whom had heard anything about the Nigerian warrant or  
19 didn't care about it -- but they brought them in, the investor  
20 witnesses, and they asked them to interpret what this language  
21 meant. The problem was two of them hadn't even read it. They  
22 told you that. They hadn't read it before they were on the  
23 witness stand. But they were going to tell you what they  
24 expected. Read the documents, gentlemen, before you come in  
25 here and opine, give your opinion as to what you thought was

DCHUBAL3

Summation - Mr. Tacopina

1 going to happen before you charge him with misrepresenting.  
2 That's the best that you had -- the witnesses, the investors  
3 who didn't read the due diligence documents or the offering  
4 memorandums?

5 You know, different interpretations, open to different  
6 interpretations some of these documents. What that really  
7 means is people can look at it and see different things. If  
8 that's the case, folks, if that's the case, you can't say that  
9 Michael Balboa misrepresented or is guilty based on that.  
10 Someone looks and says, I think it means this. Someone looks  
11 at it and says I think it means something else. And he is  
12 going to be held to the highest penalty the law allows, a  
13 criminal offense for something that is ambiguous, open to  
14 interpretation.

15 Investor McNally when finally confronted read -- when  
16 he is the one who read it, he is the only one of the three that  
17 read it -- confronted with Millennium documentation  
18 acknowledged that the fund in certain instances could actually  
19 substitute its own value.

20 Let me show you a piece of that testimony. First  
21 question and answer really does it, that offering memorandum,  
22 what that is telling investors in certain instances, OK, the  
23 fund may say, you know what, we are going to substitute our own  
24 value -- The thing that can never happen. It does say that.  
25 Of course it does say that. It is telling them that. It

DCHUBAL3

Summation - Mr. Tacopina

1 wasn't a surprise to anyone. Only with illiquid securities  
2 which was what Nigerian warrant was.

3 Ms. Molberg told you that Mr. Balboa was permitted  
4 under the documentation to communicate with GlobeOp and  
5 counterparties to give his opinion. He was certainly permitted  
6 to say what he believed the price was. That's what she told  
7 investors. She told you all. Just because some investors  
8 didn't read the offering memorandum because they chose not to,  
9 doesn't mean that Michael Balboa should be branded a criminal  
10 because they mistakenly thought something else because they  
11 didn't bother to read this.

12 Look, here's some of the investors. I want to show  
13 you, Mr. Keswani. Did he read the due diligence questionnaire?  
14 Did he read the offering memorandum? Did he invest because of  
15 the Nigerian warrant? He told you no to all of this.

16 Another investor was Mr. McNally. Did he read the due  
17 diligence questionnaire? Did he read the offering memorandum.  
18 Did he invest because of the Nigerian warrant? He told you no.  
19 And Mr. Daniels is the only one that read it, but two of the  
20 three people didn't even read it. In fact, had Mr. Keswani  
21 gone to some of the investor meetings he would have known --  
22 when I say investor meetings, the meetings with the Millennium  
23 people, Mr. Balboa. Ms. Molberg, when Dolomite was considering  
24 investing. He would have known that Michael Balboa was  
25 involved in the valuation process, as opposed to getting on the

DCHUBAL3

Summation - Mr. Tacopina

1 stand and saying he didn't know, he never would have invested.  
2 Maybe you should have spoken to the people who were at those  
3 meetings with Dolomite, Mr. Keswani, maybe you should have.

4 Remember what I said earlier, that I was going to show  
5 you living proof that what happened in reality was that Ms.  
6 Molberg told investors about Mr. Balboa being involved? Here  
7 is the living proof. Someone from Dolomite's team -- this is  
8 from the Dolomite due diligence package that is in evidence --  
9 someone from the Dolomite team who was doing diligence on this  
10 fund wrote that very significant note. When it came to  
11 valuation, according to the notes in the Dolomite file, from  
12 the people who were actually at the meetings and read the due  
13 diligence questionnaire, unlike Mr. Keswani who came here to  
14 tell you about it -- valuation, Mike Balboa. That's in their  
15 notes. That is devastating to them. They can't even touch  
16 this. They can't get around it. It is clear as day. That's  
17 what the investors were told when they were deciding what to do  
18 and now they are trying to say, they never said Michael would  
19 be involved in the valuation, ever. There it is. That is  
20 their pen, not Balboa's, not anyone at Millennium.

21 The prosecution makes a big deal out of certain  
22 language. It says no valued in-house, the next paragraph says  
23 that there is an exception, you saw that the portfolio manager  
24 retains oversight.

25 But GlobeOp, as the valuation agent would certainly be

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Summation - Mr. Tacopina

1 responsible at end of the day for valuing the portfolio, except  
2 for the exceptions, but they are responsible for it. The asset  
3 were not valued in-house. It is up to GlobeOp to put the final  
4 number up there. And with regard to illiquid securities --  
5 illiquid securities only -- the counterparties gave their marks  
6 to GlobeOp, and GlobeOp was free to accept or reject them as  
7 they chose. GlobeOp at the end of the day clearly calculated  
8 the NAV, the net asset value of the fund at the end of every  
9 month. No question about that.

10 Don't forgot why GlobeOp was brought in as valuation  
11 agent. Karoline Molberg told us. Mike Balboa brought in a  
12 valuation agent to help with back office functions because the  
13 fund didn't have all the abilities, didn't have all the  
14 infrastructure in place to do the heavy lifting that is needed  
15 when valuing funds that deal with a significant number of  
16 illicit assets through the mark to market process. It was  
17 Balboa that suggested that. Think about that for a second. He  
18 brought in GlobeOp. Mr. Balboa, if he truly had some criminal  
19 intent, why bring in an outside valuation agent in the first  
20 place. Just do it yourself like Joe Strubel did. Joe Strubel  
21 was Mr. Balboa's boss at Millennium, but he also had his own  
22 fund. This fund called the High Yield fund. You heard from  
23 Molberg, from Gibson-stark. He didn't have GlobeOp.  
24 Independent valuation, they can do it all in-house, which she  
25 could have done, but he brought in GlobeOp.

DCHUBAL3

Summation - Mr. Tacopina

1 By the way, because a valuation agent is assisting the  
2 fund by calculating its net asset value doesn't mean that  
3 Balboa was not part of the valuation process get those two  
4 things --

5 The portfolio manager giving his opinions to  
6 counterparties and correcting GlobeOps' mistakes is not  
7 Millennium using manager marks. Nobody gave manager marks in  
8 this case, and they can say that all they want. That didn't  
9 happen here. On what the numbers were and living example --  
10 GlobeOp was free to accept or reject, as were the  
11 counterparties.

12 Charlesworth came in here with his 25 years of  
13 experience managing these funds, investing in them. He told  
14 you he dealt with 5 to 700 different hedge fund managers. And  
15 he firmly expected that Balboa would be telling counterparties  
16 what his belief of the valuation of the illiquid securities.  
17 The government attacked Mr. Charlesworth like he was a  
18 co-conspirator. He was a victim in his case, according to  
19 their theory. He fraudulently lost money, according to them.  
20 Because he on his own here and testified on behalf of Michael  
21 Balboa, the guy doesn't know other than to be in some  
22 investments with him, who lost him some money. He believed  
23 that was the right thing to do. You heard his testimony on  
24 that --

25 The prosecution tried to make you believe that even

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Summation - Mr. Tacopina

1 Balboa could have absolutely no part, that was their first pick  
2 at this. Balboa could have no part even speaking to  
3 counterparties. You remember the testimony here. First, there  
4 was this issue of a conflict. They said, Michael Balboa could  
5 have no part in the valuation process, only GlobeOp could  
6 because that would create a conflict of interest.

7 Ms. Gibson-Stark said because Balboa could make more money if  
8 the NAV went up. Guess who else had a conflict of interest?

9 Ms. Gibson-Stark admitted it in her testimony, she said,  
10 GlobeOp's fee is based on the net asset value. The higher the  
11 NAV goes, GlobeOp gets more money too. That's not my conflict.  
12 That's GlobeOp's conflict. She is right. It is GlobeOp's  
13 conflict. And Mr. Greaves from GlobeOp even said, so basically  
14 I asked him, the higher the value of the fund, the more fees  
15 for GlobeOp got. Yes, that's how it works.

16 Now, regarding what relative percentage of the fees  
17 that we are getting, that doesn't matter. He will say, well,  
18 there was a less percentage of fees. They still get more money  
19 the higher the NAV goes. It is all relative. That's how they  
20 get paid.

21 One other thing on this point, that is sort of  
22 crucial, Ms. Gibson-Stark, looking at the Millennium offering  
23 memorandum, acknowledged that the directors of the fund can  
24 adjust GlobeOp's value. Think about that. The board of  
25 directors, the directors of the fund can adjust GlobeOp's

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Summation - Mr. Tacopina

1 value. That is after GlobeOp sets it. Think about that for a  
2 second. All of this talk about final mark, you can't touch it.  
3 That undercuts any notion whatsoever that only GlobeOp could be  
4 involved in the valuation process and avoid a conflict of  
5 interest.

6 Now, what happened initially is when Ms. Gibson-Stark  
7 was asked, Balboa didn't even Balboa speak to counterparties.  
8 Look what Ms. Gibson-Stark said to you on direct examination.  
9 When it came to the portfolio manager with respect to  
10 counterparties that GlobeOp was consulting, what could he do?  
11 He couldn't do anything. It's on the record. Could he talk to  
12 them, the prosecutor asked? No.

13 That's what they are trying to make you believe  
14 initially. Balboa, like those phone calls made, game set and  
15 match. He is wrong. He has committed some sort of crime. He  
16 is doing something wrong. That was then.

17 Then on cross-examination after being confronted with  
18 all the documents, of course, he can talk to GlobeOps. He can  
19 give his opinion. Look what happened? This is the same  
20 person, Ms. Gibson-Stark on cross.

21 Did you testify later on during your examination that  
22 portfolio managers could give their opinion regarding the value  
23 of an illiquid security? That is what is consistent with the  
24 offering memorandum. That is what is consistent with what  
25 Eammon Greaves from GlobeOp told us. It is consistent with

DCHUBAL3

Summation - Mr. Tacopina

1 emails.

2 And then she tried to downplay the importance of the  
3 documents when she had to admit this. She said, well, the  
4 documents couldn't possibly set forth everything that was in  
5 there. She told you that, basically, things that aren't in the  
6 documents could happen anyway. That was the whole point. They  
7 were saying, it wasn't in the documents. If he did it, it must  
8 be misrepresentation.

9 So now, I guess, they want to have it both ways. They  
10 hoist the documents up to show that the language may be it  
11 helps them, albeit a misinterpretation of the language. They  
12 say, here is the document. You have to rely on these. Then  
13 when there is something that is not in the document, they tell  
14 you, well, it don't really matter because there are other  
15 things that happened that are not written. You can use the  
16 documents only as a guide.

17 The judge will instruct you about witness credibility  
18 in his instructions. One of the witnesses I want you to think  
19 about is Ms. Gibson-Stark. On cross-examination, she couldn't  
20 answer a single question directly. It was like pulling teeth.  
21 She had to be directed to answer questions. I will just give  
22 you one example. It is so long, it is by Mr. Dubin where,  
23 basically, she was asked if Balboa and GlobeOp -- not the  
24 valuation agent -- were interacting about valuation issues, the  
25 very heart of this matter. And when Mr. Balboa told GlobeOp in

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Summation - Mr. Tacopina

1 an email that the security was making 3 million, more like  
2 600,000, she wouldn't give a straight answer on this at all.  
3 Back and forth, and the Court asked, is the answer to the  
4 question yes? Yes. Why did we have to pull teeth to get a  
5 straight answer.

6 First of all, one thing she didn't want to give a  
7 straight answer on there. Look what Mr. Balboa is doing there.  
8 He is giving his opinion that the funds's value, based on  
9 GlobeOp's error, should be lowered by 2.4 million dollars lower  
10 the fund's value by 2.4 million. And she didn't want to admit  
11 that. She was resistant. Why? The whole finger-pointing, it  
12 can't be Millennium's fault. It must be his fault -- or  
13 GlobeOp's fault. It is unbelievable, and when you say the word  
14 "scapegoat," it comes out live from the transcript on these  
15 papers.

16 Let's not forget this question over and over, the  
17 valuation agent staying consistent. There was the one question  
18 about the warrant, and we talked about this already. But the  
19 notion that the Nigerian warrant price stayed the same from  
20 September of 07 to March of 08. If it stayed the same, it  
21 means that it couldn't add to the NAV, didn't add any increased  
22 value.

23 First, she said no. Then she said it was a very  
24 complex calculation. What was she talking about? If the price  
25 doesn't move. You can't add any value to the NAV. Of course.

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Summation - Mr. Tacopina

1 It was something that had to be asked about 9 or 10 questions  
2 before she finally gave the answer. But even, even with her  
3 agenda, the fact that she is in Millennium right now, she  
4 agreed that GlobeOp consult with the investment manager, and  
5 that was obvious because the document said so, and that the  
6 investment manager -- the investment manager was Millennium  
7 Global Investment Limited. That's not a person. That is a  
8 business entity, OK. And who was the representative of that  
9 business entity.

10 It was Michael Balboa, the manager and the managing  
11 director of the Emerging Credit fund for Millennium Global  
12 Investments limited. That's why Balboa was listed as the  
13 contact person on the document that you saw, Government Exhibit  
14 2, name of contacts for Millennium Global Investments Limited.  
15 Michael Balboa and Molberg. Balboa's title managing director,  
16 Emerging Credit.

17 There is this whole thing, Mr. Keswani -- I don't want  
18 to get into that whole thing with his son in Wisconsin, but he  
19 tried to say that Balboa's title is just a title, he didn't  
20 have any power or authority. Read this, of course. This lists  
21 Balboa as someone who has an entire team below him. Even in  
22 the event of such loss, meaning incapacitation of Michael  
23 Balboa, like he is kidnapped, died or can't work anymore, they  
24 identified who has to replace him. He is not someone with just  
25 a title. This was someone else who was so valuable, they had

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Summation - Mr. Tacopina

1 to decide who was going to replace him. This was a guy who was  
2 so valuable, they had to anticipate, God forbid something  
3 happened to him who was going to replace him. That was in the  
4 offering memorandum that Mr. Keswani obviously didn't read. He  
5 was the one for the investment manager.

6 And the other thing about that, Dolomite didn't know  
7 that -- the due diligence team from Dolomite was paying  
8 attention because here is another one of their notes in their  
9 due diligence document, IM investment manager, Michael Balboa.

10 Wondering who the representative for the investment  
11 manager was? It is very clear from those documents, from those  
12 notes it was Michael Balboa. Don't let anyone try to convince  
13 you otherwise.

14 We heard Matt Daniel, he said the same thing. Based  
15 on the documents, he understood that the valuation agent could  
16 consult with the investment manager for the most appropriate  
17 valuations. And when confronted with that slide, confronted  
18 with that language, he said that different investors might have  
19 different understandings of consulting. That was Mr. Daniel on  
20 cross.

21 Again, depending on exactly what your definition of  
22 consult is, you may have certain definition of consult with  
23 another. Is it fair to say yes, yes. He said that it was  
24 correct that the valuation agent could have consulted the  
25 valuation manager. That was the first question and answer.

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Summation - Mr. Tacopina

1 Think about that scene right there.

2 So the different interpretations of what consult is  
3 and what that means, the fact that they are trying to squeeze  
4 that into some notion that he did something wrong, that there  
5 was a misrepresentation is unbelievable.

6 You saw the emails. There was as lot of emails  
7 with -- you know heard from Molberg and Greaves that there was  
8 interaction between Pratt and Balboa and GlobeOp and De  
9 Charsonville and Balboa. Of course, Pratt even told us that  
10 Balboa could communicate with GlobeOp, he was the fund manager.  
11 and not only could he talk to them, but he talked to  
12 counterparties about pricing -- paid someone who would  
13 certainly not be in a position to help Mr. Balboa at this point  
14 with all of the litigation.

15 You would agree, Mr. Greaves that Mr. Balboa directly  
16 interacted with GlobeOp with respect to valuation on many  
17 occasions in 2008. He certainly provided his opinion on  
18 whether or not he thought the values were accurate or not.

19 All agree that Mr. Balboa directly interacted with  
20 counterparties in the same way?

21 Yes, he did.

22 There was no secret here. There was no secret in any  
23 way, shape or form.

24 There are a bunch of emails. They are all in  
25 evidence, but I just want to review one or two of them. And

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Summation - Mr. Tacopina

1 what the email show is that Mr. Balboa is talking to  
2 counterparties about valuations. In fact in some of the  
3 emails, Mr. Balboa did more than talk about the valuations of  
4 assets. He went so far as to actually challenge the valuations  
5 of the counterparty.

6 If you look at Defense Exhibit L, this is an email  
7 from Mr. Balboa to Mr. Howe at Citibank -- a counterparty, by  
8 the way -- saying that his prices for another asset, this Sri  
9 Lankan TRS, looked wrong. He is challenging them. And you  
10 know who was CC'd on that? Mr. Greaves was CC'd on that. He  
11 agreed this was another example of Balboa challenging  
12 counterparty prices with GlobeOp knowing. That was  
13 Mr. Greaves' testimony. With GlobeOp knowing, they are CC'd on  
14 that email where Balboa said that the price is wrong.

15 I thought he couldn't be involved, according to  
16 Ms. Gibson-Stark. Now he is telling them the price is wrong.

17 You know, GlobeOp never said this -- and Mr. Greaves  
18 said this -- well, you can't do that. You can't tell the  
19 counterparties who are giving us prices that their prices are  
20 wrong. He did it right in front of them.

21 Now, there was something else in Mr. Cowley's  
22 submission. He showed it to you. He said Mr. Greaves told  
23 you, on direct he told you, if Balboa had sent you marks for  
24 any securities in his fund, could GlobeOp have utilized those  
25 to value his fund. He said no. And that's what the testimony

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Summation - Mr. Tacopina

1 he said showed.

2 Here's the thing about this. Look at how they argued  
3 that. What they tried to show you let's look at reality.  
4 Let's look at Defense Exhibit M, please. This is June 2008.  
5 Michael Balboa is interacting with GlobeOp -- Ms. Ganapathy is  
6 from GlobeOp -- regarding the price of a security in his fund,  
7 not the Nigerian warrant, but a different one.

8 Ms. Podill, and he is interacting and saying it  
9 shouldn't be one price, it should be another. Look at how he  
10 says it, telling GlobeOp, this security of mine, Podill,  
11 shouldn't be priced at this, but 100, as this bond was put at  
12 100.

13 MR. TACOPINA: I would suggest he is telling or  
14 directing GlobeOp what the price should be.

15 If this were Gilles De Charsonville on this email  
16 instead of GlobeOp -- and the oil warrant, this is evidence --  
17 that he was directing the counterparties. There will be  
18 evidence. This is a security. No allegation of wrongdoing and  
19 he is telling GlobeOp what the price should be -- telling them,  
20 not asking them.

21 And Mr. Greaves said on his direct, and they pull that  
22 one thing out, if he was giving his price, we couldn't accept  
23 it. They just did. They just did. In that instance on cross,  
24 when I showed that to Mr. Greaves, he said, that is Mr. Balboa  
25 providing his opinion.

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Summation - Mr. Tacopina

1           Now, you will never find in that Podill -- that is  
2 Defendant Exhibit M -- you will never find in this case any  
3 stronger language from Mike Balboa to De Charsonville or Pratt,  
4 when it comes to valuing the Nigerian oil warrants. He is  
5 telling GlobeOp what the price is. That's OK. They have to  
6 check their own numbers, but that's OK. They all told you  
7 that.

8           Anyone who was going on back then, it wasn't a problem  
9 was called or dealing with liquid securities. Defense Exhibit  
10 X is known -- very quickly -- it is the same thing. Mr. Balboa  
11 is speaking to another counterparty at UBS, telling him the  
12 price, 105, 106. He is giving his opinion.

13           Same to do with De Charsonville and Pratt. This is  
14 the same kind of counterparties, has nothing to with any  
15 allegations of wrongdoing -- same thing he did with De  
16 Charsonville and Pratt.

17           They described the month-to-month market, De  
18 Charsonville, and he said that he would be contacted by  
19 GlobeOp. Then he would call Balboa and help develop the access  
20 valuation. He would that he would be contacted by GlobeOp and  
21 he would call GlobeOp to help develop the assets valuation. De  
22 Charsonville said, he wasn't requesting Ms. Balboa's opinion on  
23 prices. That is what he told you? This is a scheme. I'm  
24 asking his opinion on prices.

25           This is him testifying now as a cooperating witness,

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Summation - Mr. Tacopina

1 getting a free pass. That's what he was doing back then, he  
2 tells you. And there is nothing wrong with that. Mr. Balboa  
3 can give you security. Mr. De Charsonville admitted that. Of  
4 course he admitted that?

5 Once he admitted that, he realized, that's going to be  
6 a problem. So I basically said he could give me his opinion on  
7 securities -- no difference than any other security with the  
8 Nigerian warrant. It is the same interaction. Same cadence.  
9 Same tone.

10 But what he then says when Balboa gave him his opinion  
11 on the price, what he then says is this. The Nigerian Oil  
12 price, it was a direction; it wasn't an opinion.

13 Look at him trying to explain that ridiculous answer.  
14 It is a long stretch of transcript, but I think it is important  
15 to see what happened here. This is from De Charsonville on  
16 cross. On the bottom there is an attribution:

17 "Q Where you were telling Mr. Balboa you have it at a certain  
18 price and he gives you his opinion, that is on of the  
19 securities in his fund, correct?

20 "A It is one of the securities in his fund, yes, that's  
21 correct.

22 "Q And you gave him a price and he gave you his opinion on  
23 it, correct?

24 "A Yes, I mean, you know, very thin line between opinion and  
25 direction."

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Summation - Mr. Tacopina

1           Let's follow that thin line through. Let's focus on  
2 this one. I started going through examples with him. There is  
3 a discussion there about the pricing of a security and Balboa  
4 said, "they probably should be a bit lower, I think."

5           I asked him about that one, is that a direction or an  
6 opinion. How do you decide that, Mr. De Charsonville?

7           Well, 62 would be an opinion, 67 would be a  
8 direction -- actually deciphering between the lines, which line  
9 is opinion and which line is direction. Then again on this  
10 one, Balboa said, why don't we take it down like 5. I am  
11 guessing something like that.

12           Yes.

13           He is asking why don't we take them down 5. And he  
14 says that was a subtle direction.

15           Next, look at this. The next page. We keep going on  
16 this. I go through another one of the securities, the pricing,  
17 the back and forth. I ask him, is that a direction or an  
18 opinion? "Same answer as before."

19           He didn't want to say that again. It was ridiculous.

20           What was the answer? It is a very thin line between  
21 opinion and direction in this case.

22           The last one, on page 2, you start going through it  
23 and you go to the securities in Michael Balboa's fund during  
24 that mark-to-mark that you heard on tape.

25           So is that the same thing, is it a direction?

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Summation - Mr. Tacopina

1 He says it is a direction.

2 I said, so he is directing you to mark it down?

3 Yes, yes, he is.

4 This was what Mr. Balboa did, not only with him, but  
5 with all the other counterparties. It was no difference with  
6 De Charsonville.

7 De Charsonville starts scrambling for an answer:  
8 Opinion is OK. Direction is no good. That was a subtle  
9 direction.

10 He was ridiculous in trying to come up with excuses as  
11 to why when something was wrong when nothing was wrong. In his  
12 own mind, in De Charsonville's mind, maybe there was a thin  
13 line between opinion and direction, but what is important here  
14 is what was in his mind -- not De Charsonville -- what was in  
15 his mind.

16 You saw Mr. Balboa make the same comments time again  
17 in different processes. Again, the tone of the case,  
18 everything is the same.

19 Mr. De Charsonville and Mr. Balboa, and Mr. Pratt, for  
20 that matter, were not accused of wrongdoing with any other  
21 marks. In fact, he testified, Mr. De Charsonville, now at this  
22 trial that the law directed him to give prices like 3 to 4,000  
23 he testified at a prior proceeding earlier this year, that  
24 prices weren't directed. So in other words, a few months under  
25 oath, this process was going on, he never used the word

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Summation - Mr. Tacopina

1 "directed" before. I got it him on the cross and that is in  
2 there. I never used the word "directed" before, and that's  
3 something that I just started using now.

4 MR. COWLEY: We would object based on the motion in  
5 limine.

6 THE COURT: Overruled.

7 MR. TACOPINA: Balboa never threatened De Charsonville  
8 to give him a price. I asked him all of these questions. Did  
9 he ever say that he would cut off work from Millennium for you  
10 guys if you don't do this?

11 The answer is no across the board, and he admitted to  
12 this day, DeCharsonville said, I don't even know what happened.  
13 I told him I wasn't doing it.

14 We found out with Pratt. Nothing happened. I don't  
15 know what would have happened if I had challenged the price.  
16 Why? Because I never did that. I never did that.

17 De Charsonville knows that he could have rejected  
18 Balboa's prices. He said that to you. There it is from the  
19 transcript. Whatever thin line between opinion and direction  
20 De Charsonville created in his own mind when trying to avoid  
21 prosecution and trying to come up with an answer for these  
22 conversations that are clearly not problematic for Mr. Balboa,  
23 this thin line between direction and opinion. That thin line,  
24 maybe in his mind regarding direction or opinion -- there is a  
25 very, very clear line between guilty and not guilty. It is not

DCHUBAL3

Summation - Mr. Tacopina

1 a thin line.

2 The prosecution tried to do things like showed you  
3 emails. I don't have it on the screen, it is 1144. It is that  
4 email where de Charsonville and Balboa are interacting. And  
5 apparently the prosecution tried to show you that there was  
6 intent to commit fraud from a brief message chat with De  
7 Charsonville whether he was free to do the mark-to-mark.

8 Balboa said, can we do tomorrow -- that was in Mr.  
9 Cowley's summation.

10 They are not talking about just the Nigerian  
11 warrant -- they are talking about all of the assets, the  
12 mark-to-market on all of the assets when there is no allegation  
13 of wrongdoing.

14 GlobeOp was asking De Charsonville for the numbers.  
15 De Charsonville has been responsive, simply wanted to give him  
16 a reason for blowing them off. And he wanted to say, well,  
17 tell GlobeOp, I will talk with them tomorrow. I didn't do my  
18 diligence yet. I haven't gone through this yet.

19 Pratt also told you about talking to counterparties.  
20 He said there was nothing abnormal here at all. It is not any  
21 intent to commit a crime.

22 Pratt also told you about talking to counterparties,  
23 and I could cite transcripts on him, but he said there was  
24 absolutely nothing abnormal here at all. It is customary,  
25 especially for illiquid materials, just like De Charsonville

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Summation - Mr. Tacopina

1 said, and he understood what Balboa was doing was getting his  
2 opinion. That's what Pratt told you. He said that he believed  
3 that for illiquid securities was fine. He said that when he  
4 first started counterparty pricing with Mr. Balboa, Mr. Balboa  
5 said to him, Sam, I want you to provide independent valuations  
6 on securities in my fund. That's how Michael Balboa directed  
7 Sam Pratt to do anything? By independent valuations, confirm  
8 the price I am giving you. That's what Pratt said.

9 It is not just giving his opinion. Mr. Pratt told you  
10 that he was free to reject and not pass on any of Mr. Balboa's  
11 prices, his opinions, like he ultimately did, without any  
12 repercussions from Mr. Balboa whatsoever. He only did this for  
13 three months in 2008. He passed on January, February, March.  
14 That's when the Nigerian oil didn't move an inch and it stayed  
15 stagnant. Then what happened? Pratt said, I'm out. Nothing  
16 bad.

17 Balboa went on, Mr. Cowley said, then he went with one  
18 counterparty to control the process -- Balboa went with one  
19 counterparty? We are not GlobeOp. GlobeOp agreed to one  
20 counterparty. Millennium agreed to one counterparty. He made  
21 this decision. Everyone agreed to that, not Mr. Balboa alone.  
22 He couldn't alone.

23 Again, he said he was afraid to have someone else in  
24 the scheme. Really? Who like Emanuel Gill who, by all  
25 accounts, was not part of any scheme, was an emerging markets

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Summation - Mr. Tacopina

1 securities expert?

2 When you think about the stuff that you heard from  
3 Mr. Greaves at GlobeOp who said that we could have accepted or  
4 rejected the prices. Mr. Balboa is not marking the fund. If  
5 De Charsonville and Pratt had done their jobs that they were  
6 supposed to do -- we will get into that. And if they didn't,  
7 not doing their jobs -- they never once told him they disagreed  
8 with the value. Not one stitch of evidence on the record where  
9 they ever said, Mike, we don't agree.

10 Sam Pratt said I am not doing it. He said, that's  
11 fine. That's fine. Both knew that they could have, just like  
12 GlobeOp could have rejected it. So everyone accepted it.

13 And then Ms. Gibson-Stark told us, if GlobeOp had a  
14 problem, they could have rejected it. Mr. Greaves said, if  
15 GlobeOp had a problem we could have rejected it -- he actually  
16 said, well, we can exclude the counterparty price. They didn't  
17 decide not to use it. They had the ability to do that.

18 De Charsonville said the same thing, that GlobeOp was  
19 free to reject the prices, and that's what they did,  
20 ultimately, in 2008. You saw one example. In 2008, GlobeOp  
21 rejected BCP's price for the Nigerian warrant and went with the  
22 lower prices they received from two other counterparties.  
23 Under their umbrella, UBS and Exotix -- you saw in Defense  
24 Exhibit I, that email and they sent it to De Charsonville, and  
25 said we were going with our sources for this.

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Summation - Mr. Tacopina

1 By the way, GlobeOp, could have checked the values  
2 with UBS or Exotix way earlier than October 2008. And GlobeOp  
3 had under their roofs as clients, UBS and Exotix with  
4 valuations for Nigerian warrants. Mr. Greaves told you that.  
5 So they were not using them and for some reason Balboa is  
6 supposed to know that? Balboa is supposed that GlobeOp was not  
7 using their vast array of clients and this system that they  
8 invented, this GoPricing? Balboa is supposed to know that they  
9 weren't using it. That's why this whole scheme doesn't make  
10 sense. Balboa wasn't doing this in a vacuum. He wasn't  
11 handing envelopes in a restaurant under a table. This was done  
12 openly and notoriously and another entity was doing it. And  
13 according to all witnesses, GlobeOp was free to reject the  
14 counterparty's pricing here, free to reject. They chose not  
15 to -- until October.

16 If every witness thought that, why would Balboa think  
17 that? Think about that for a second. Every other witness  
18 thought that GlobeOp was free to reject the counterparty  
19 pricing. Why wouldn't Balboa? Of course he thought that. It  
20 was obvious. Despite that, he still told them here is the  
21 price for some other security.

22 Basically, at this point, we have talked about why,  
23 Mr. Balboa did absolutely nothing wrong with regarding GlobeOp,  
24 counterparties, the warrant's value.

25 I want to talk to you about the value and any notion

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Summation - Mr. Tacopina

1 that Mr. Balboa had some scheme, some motive in his mind to  
2 falsely inflate the value of the Nigerian warrant. There was  
3 absolutely no evidence of motive, and I just want to go over  
4 some of the things the prosecution said because some of them  
5 were just flat-out inaccurate.

6 What is his motive? Molberg and Charlesworth said  
7 that he was not trying to attract new investor money into the  
8 fund in 2008 -- that is powerful state of mind -- knowing that  
9 you have these false values to increase your NAV. You get more  
10 money, the NAV goes higher. He wasn't taking in any new money.  
11 OK. Investors were subject to this lockup period, so even if  
12 they were not impressed by Balboa's NAV, they were not going  
13 anywhere. They were subject to a lockup period in 2008.

14 By the way, the volatility of the fund you heard a  
15 little bit about that. It was well within range to where it  
16 needed to be -- it wouldn't have affected that -- the Nigerian  
17 warrants, one way or another.

18 You heard about these fees, the performance fee versus  
19 the management fee. Performance fee is the one where you get  
20 the big payday, if you do. And that is where if you reach that  
21 high water mark -- and we talked about that -- you get 20  
22 percent of that profit. The only problem is, it never happened  
23 after March of 2008.

24 More importantly, the 8 million that was paid, the  
25 check was not payable to Michael balboa -- they tried to make

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Summation - Mr. Tacopina

1 you believe when they put that up. That was paid in March for  
2 performance fees that were in the first three months and back  
3 to many people. You heard that from Ms. Molberg. The 2  
4 percent management fee was payable regardless of the high water  
5 mark, but that was to deal with the expenses of the fund and  
6 other things of that nature.

7 Balboa never earned a performance fee in 2008 -- he  
8 never earned it after March. So the rise of the Nigerian  
9 warrant with this false value had nothing to do with any  
10 performance fee earned by anyone because he didn't get. That  
11 is the high water mark. It was reached in March and never  
12 again for the rest of 2008.

13 What else about that? Look at the price. This is the  
14 government's chart, 615. Look at the price of the Nigerian Oil  
15 warrants for January, February, March.

16 517, 5-something-or-other, the chart is moving now and  
17 something else is going to happen in a second -- and there.

18 So the fund reaching that high water mark had nothing  
19 to do with the Nigerian warrant because the Nigerian warrant  
20 didn't raise it not even a bit -- it stayed in a straight line.  
21 Then after that, there was no more performance fee earned. It  
22 is important that you understand that because they are trying  
23 to attribute some financial motive to Michael Balboa by  
24 increasing these warrants. And you can take this back and look  
25 at all of these exhibits.

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Summation - Mr. Tacopina

1           Now, also, what you have to have and understand is  
2           that there would be no -- Mr. Charlesworth, by the way, came  
3           and told you, the thing that the prosecution was trying to do  
4           was, well, the Nigerian warrants comprise 10 percent of the NAV  
5           as opposed to what you really should be looking at which is the  
6           gross asset value of the fund. And he said it is like  
7           comparing apples and oranges because it doesn't compare the  
8           Nigerian warrant with all of the fund's holding which was in  
9           the billions. So a warrant was only a sliver of the fund's  
10          entire positions. That's the thing that Charlesworth said that  
11          the investors are focused on.

12           By the way, Matt Daniel even said that in an email to  
13          Ms. Molberg. He asked her for the gross positions. You can  
14          look at it if you want.

15           The NAV, regarding the percent of a warrant is  
16          irrelevant because Mr. Balboa didn't benefit from its increase  
17          whatsoever.

18           And then the individuals from FINRA with all of those  
19          charts trying to sway you saying the same thing over and over  
20          in different ways. Look how much red is on the chart. That is  
21          the relative size of the warrant to the NAV. That is wrong.  
22          That is not what you look at.

23           First of all, he admitted he had no personal  
24          information about anything on those charts. He made know  
25          independent determination, Mr. Howard, and the prosecutors told

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Summation - Mr. Tacopina

1 him what to create in those charts, a series of systems, as he  
2 said

3 second, the chart was so skewed it misrepresented.  
4 The fund's NAV started with a point of 400 million. That's  
5 where the chart started 400 million instead of zero to make the  
6 impact of the warrant look so much bigger-- look what happens  
7 here. They will acknowledge that by the way, Mr. Cowley on  
8 cross-examination, that last question and answer. It is a lot  
9 tougher seeing that with your chart starting from zero. Look  
10 at the two charts. That was Government Exhibit 2006, much more  
11 red up here. Starting up here, much more red up her. But you  
12 see 400 million, see what happens when zero is supposed to  
13 start -- heck of a lot less red. That is the appropriate piece  
14 of Nigerian Oil warrants for the entire fund.

15 Look at this pie chart. Instead of looking at the  
16 NAV, by the way, Mr. Charlesworth said he drew it, this was the  
17 version. The correct valuation of the Nigerian warrant is here  
18 in the gross, the one that was 2 percent of the 80 million.

19 I'm sorry. Mr. Dubin, thank you very much. 2 percent  
20 of the 3.5 billion which equals 80 million. Look at the NAV,  
21 which Mr. Charlesworth told you not to do, was 9.5 percent of  
22 the 844 million. It is a big difference. That's what you have  
23 to be looking at as an investor, and Charlesworth told you,  
24 that Ms. Molberg told you that.

25 If there is any question, Mr. Balboa didn't try to

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Summation - Mr. Tacopina

1 falsely inflate the Nigerian warrant. There are a couple  
2 things that you can look at. You can look at his state of  
3 mind. During the very same time period, he is accused of  
4 trying to falsely inflate these things by pumping them up, he  
5 caught a serious mistake by GlobeOp that caused the fund to be  
6 reduced by \$30 million. You heard Mr. Keswani, some of the  
7 investors got angered by that mistake. GlobeOp made a mistake,  
8 Mr. Balboa caught it. He is looking to falsely inflate values,  
9 but he corrects 1 of the mistake that GlobeOp makes in which  
10 his fund goes up \$30 million. It is like a freebie, because it  
11 was GlobeOp's mistake.

12 That wasn't the only evidence that you heard of him  
13 correcting valuations because he believed that GlobeOp set the  
14 NAV too high, which would have earned him more money. You  
15 heard it before where GlobeOp says that they thought the profit  
16 of one particular instrument was too high, where Balboa thought  
17 it was too high, \$3 million and Balboa said the instrument  
18 should have been around 600. That is evidence of him lowering  
19 the value of his net asset value of his fund.

20 MR. COWLEY: Objection.

21 THE COURT: Mr. Tacopina, don't talk about markdowns.

22 MR. TACOPINA: That was a correction of GlobeOp. I  
23 will move on.

24 THE COURT: Thank you.

25 MR. TACOPINA: Those are the ones that slipped through

DCHUBAL3

Summation - Mr. Tacopina

1 the cracks. I didn't mention anything about the trillion  
2 dollar whatever error. Obviously that was a ridiculous error.  
3 But these were not mentioned at all in the prosecution's  
4 summations.

5 You heard that these warrants are incredibly  
6 difficult to price. Witness after witness came in. And,  
7 ladies and gentlemen, it is easy to Monday morning quarterback  
8 getting nonpublic -- nonpublic -- trading information with a  
9 government subpoena. And being able to discuss the inner  
10 workings of the Nigerian debt office, with their advisors. It  
11 is easy to come in five years later and talk about that, but  
12 when Mr. Balboa is dealing with this in real time and 800 other  
13 securities, by the, way. He didn't have the luxury of a United  
14 States federal government subpoena, the power to get these  
15 numbers that Mr. Howard was able to get via subpoena. And he  
16 certainly didn't have any heads of state advising him or  
17 anything like that. You heard about the warrant being thinly  
18 traded Nigerian warrant, highly illiquid securities.

19 Half a dozen witnesses came in here and all said the  
20 same thing, that this was almost impossible to price. I think  
21 De Charsonville said it was a nightmare to price.

22 And Mr. Sequeira, for some reason, came in and he  
23 didn't really want to use that term, illiquid. He struggled on  
24 it, but at the end of the day, he said that he was really a  
25 little confused about the Nigerian warrant. He might have said

DCHUBAL3

Summation - Mr. Tacopina

1 that to the prosecutors. He said it. He told us that stocks  
2 like IBM trades tens of millions of times a day. And you heard  
3 the difference between an IBM liquid security and an illiquid  
4 security and a Nigerian Oil warrant security.

5 The prosecution keeps pointing to those other prices  
6 on the market, and you can't just look at a tremendously small  
7 number of trades. And Mr. De Charsonville, you heard from that  
8 some who lives and breathes the stuff, not from lawyer's  
9 argument. You cannot take a relatively small number of trades  
10 and say, trading 200 times in a year, in this range, that must  
11 be the price. That doesn't work with illiquid securities. And  
12 that's why Millennium specifically made this warning in that  
13 offering memorandum. It talked about illiquid portfolio  
14 investments. It gave you that warning about prices not being  
15 reliable and not taking into account some of the trades that  
16 are there.

17 Now, they are trying to convince you that Mr. Balboa's  
18 was wrong and they were trades over the year -- even though  
19 they were illiquid. Those weren't even real trades. As you  
20 learned they were not even real trades experienced. Portfolio  
21 manager knows that you cannot price illiquid of a couple of  
22 hundred of trades a year. Mr. Charlesworth came in here and  
23 that's what he did.

24 These prices that were up in those charts were not in  
25 Bloomberg for the public to see. They were not publicly

DCHUBAL3

Summation - Mr. Tacopina

1 available on Bloomberg in 2008.

2 Mr. De Charsonville told you he looked and he didn't  
3 see.

4 Pratt told you he looked and he didn't see it. And  
5 Pratt said that Goddard that he worked with was an emerging  
6 market specialist and he didn't see it.

7 And Greaves from GlobeOp, to get these counterparties  
8 involved, the reason that he did that was, even if he saw  
9 illiquid securities like Nigerian warrants on Bloomberg, he  
10 would not be comfortable relying on those prices because they  
11 could be wildly inaccurate.

12 What Mr. Sequeira from Exotix testified to was, he was  
13 able to pull up Exotix's prices on Bloomberg, but that was  
14 different; that was an Exotix screen.

15 And Mr. Cowley kept saying, Mr. Balboa had to have  
16 access to the ALL-Q Bloomberg screen. The one Exotix had  
17 access so Mr. Balboa had to. No. Those were nonpublic numbers  
18 for the Nigerian Oil warrant.

19 It would make sense if he had access to it, it would  
20 make said sense is not enough. Millennium's computers would  
21 have been right in front of you You would have seen records  
22 of the fact that Mr. Balboa had access to those nonpublic  
23 Bloomberg screens back in 2008.

24 MR. COWLEY: Objection.

25 THE COURT: Overruled.

DCHUBAL3

Summation - Mr. Tacopina

1 MR. TACOPINA: And more, Mr. Sequeira admitted that he  
2 only accessed that information from an Exotix terminal.

3 I think you heard yesterday, the Bloomberg witness  
4 came in here and he said that those Exotix screens were private  
5 to Exotix and in order to access them, Exotix had to give you  
6 authorization. That's what the Bloomberg witness came in here  
7 and said yesterday.

8 The market in general could not see those warrants in  
9 2008. No dispute. Witness after witness told you that, and  
10 that's why the prosecutors had to subpoena them. Mr. Howard  
11 even told you that in his testimony:

12 The information contained on the chart was not  
13 publicly available, was it, Mr. Howard?

14 No. I don't believe so.

15 A subpoena was necessary to get that information.

16 Yes.

17 We also know the recollection -- let's take Mr. Howard  
18 for a second. He admitted that the charts weren't meant to  
19 imply that the information on them were known to the general  
20 public. He said that on cross-examination.

21 At this point these charts were not meant to convey  
22 that the trading prices were known to Mr. Balboa. He said, I  
23 wasn't trying to convey that.

24 Funny, Government Exhibit 6000 that they put up just  
25 now says actual known trading prices. They just argued that to

DCHUBAL3

Summation - Mr. Tacopina

1 you, despite the guy who created the charting telling you by  
2 the way of his testimony that those were not actual prices.  
3 They were not publicly available.

4 I subpoenaed them. I wasn't trying to imply that  
5 Mr. Balboa knew those.

6 Actual known trading prices -- known to whom?

7 They are still trying to make you think that Michael  
8 Balboa had access to these numbers back in 2000 argument when  
9 he did not.

10 His charts -- they speak for themselves at this point.  
11 You have seen the different valuations. It doesn't matter.

12 Greaves told us that the prices on Bloomberg, on this  
13 case -- didn't recall -- he said that the prices don't always  
14 report accurate values for illiquid securities, and he agreed  
15 with that statement.

16 Now, the accuracy of the price of this Nigerian Oil  
17 warrant, various witnesses came in and said that different  
18 managers come up with different valuations for illiquid  
19 securities. You heard Mr. Knapp say 10 portfolio managers  
20 could have vastly different views about future values of  
21 investments. It is an open-ended question type of  
22 hypothetical, but the answer is yes to that. That is the  
23 reason why certain valuables -- and Anthony Warnars testified  
24 to that, and you heard the readback of his testimony.

25 Ms. Molberg confirmed that Mr. Balboa in fact used a

DCHUBAL3

Summation - Mr. Tacopina

1 model to price these things. You may not have a computer model  
2 in front of him doing mark-to-market. Charlesworth said that's  
3 OK. A manage who knows his models, you don't plug it in like a  
4 formula.

5 What did you learn about valuation? You heard about  
6 the written explanation that Mr. Balboa sent about his mind set  
7 in 2008 valuing his Nigerian Oil warrants from that 1553 which  
8 I am going to show you in a minute that exhibit, where he wrote  
9 that to Mr. De Charsonville.

10 His belief as conveyed in that letter to others show  
11 that the price of the Nigerian warrant was tied to oil -- no  
12 question about that and its increasing value was arrived from  
13 the excess collateral account in his mind. To him, in his  
14 mind, without access to all of these things, someone without as  
15 advisors from the Nigerian government let's see what was out  
16 there.

17 Oil was rising very quickly in 2008, during the same  
18 time period Mr. Balboa believed the value of the warrant was  
19 rising. Mr. Howard from FINRA told us that from January of  
20 2007 to August of 2008, the price of oil roughly doubled,  
21 doubled in the course of a year and a half. It wasn't some  
22 excuse that Mr. Balboa came up with. It did roughly double.  
23 We know that he just wasn't simply entering his own price at a  
24 computer in a back office, coming up with it. He had a basis,  
25 a good faith basis is what you will hear from the Court. It is

DCHUBAL3

Summation - Mr. Tacopina

1 important.

2 Look at what De Charsonville told us about that good  
3 faith basis. Manuel Gill at BCP was an emerging market  
4 specialist and Gil told GlobeOp that he thought that the prices  
5 for the warrant which Mr. Balboa expressed to BCP during mark  
6 to mark was fine. Manuel Gill agreed. That's in evidence.  
7 That is in the email from Manuel Gill to GlobeOp. He is an  
8 emerging market specialist. He didn't have a problem with Mr.  
9 Balboa's prices.

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11 (Continued on next page)  
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DCHAABAL4

Summation - Tacopina

1 MR. TACOPINA: He is not someone that alleged in part  
2 of the conspiracy or scheme. Look for the testimony. And  
3 moreover when you look -- Pratt even said, Mr. Pratt said that,  
4 well, it's possible, you know I did when I started cooperating  
5 it's possible I did tell that the prosecutors that the prices  
6 that Mr. Balboa was sending were good. That is after he was  
7 cooperating. Just try and explain this when they stand up, I  
8 am going to ask Mr. Miller to try and explain what happened  
9 here how they tried to deceive you and fast talk you in  
10 summation, talk so fast about these things. Watch this. The  
11 prosecutors showed you Government Exhibit 204. They showed you  
12 this Exhibit 204. What it was is 204 said that Mr. Balboa made  
13 an offer for the Nigerian oil warrant, to sell Nigerian oil  
14 warrant at \$208. Well, I tell you that sounds like pretty good  
15 proof that he doesn't believe his own pricing and he is trying  
16 to sell it at 280. Except there's one thing they forgot to  
17 tell you about Government Exhibit 204 in that e-mail that they  
18 showed. That e-mail was in March of 2007, a year before any of  
19 the prices of the warrants started rising. They didn't tell  
20 you that when they argued that to you, March of 2007, well  
21 before the price of oil rose dramatically. And if you remember  
22 it almost doubled by August of 2008. And guess what else they  
23 didn't tell you? That's the price Mr. Balboa had in 2007,  
24 March. Look, this is the government chart. In March of 2007  
25 he had it over two hundred dollars, slightly over. That was

DCHAABAL4

Summation - Tacopina

1 Balboa's price in 2007. Yet they try and show you an e-mail  
2 and say, look, offering it for 280. That e-mail is from 200  
3 when he knew that.

4 Also Government Exhibit 1553 Mr. Balboa's sort of  
5 right up on what he believed. This is what he sent to others  
6 explaining his thought process. Mr. Balboa is saying  
7 originally purchased in 2007. He is trying to make 20 bucks  
8 selling for 280. One, that makes this document credible and  
9 corroborates the numbers first and foremost. And secondly,  
10 misleading about that trying to say that 280 is an offer as  
11 proof.

12 MR. COWLEY: Objection.

13 THE COURT: Overruled. Fair argument.

14 MR. TACOPINA: The government tried to show that  
15 Mr. Balboa's explanation for rising oil prices was not correct.  
16 You saw this. I want to show Government Exhibit 1613, that  
17 chart where they were comparing Mr. Balboa's values to Nigerian  
18 oil warrant and the price of oil and the rise. It's so off, as  
19 his price is going up, oil is going down. But the problem with  
20 that -- and Mr. Cowley talked real fast on that one -- it has  
21 to do with payment. He said. No. If you look at Government  
22 Exhibit 4, the Nigerian oil warrant offering memo. The price  
23 of oil to be used in the calculation was based on an average  
24 six month period that trailed by 60 days before the payment  
25 date. It's not simply a matter of comparing month to month.

DCHAABAL4

Summation - Tacopina

1 You had to back out. 60 days and six months. Look what  
2 happens when you back up 60 days in six months. They  
3 corresponded almost exactly, almost exactly that's the right  
4 formula to use that's the formula that Mr. Balboa believed was  
5 the appropriate formula based on offering memorandum. Even  
6 Mr. Howard conceded that, OK. That does look much closer.  
7 What were these charts meant to represent? A mistake by the  
8 way -- and I said this in my opening -- a mistake in this  
9 process if Balboa believed this was right, him being wrong or  
10 making a mistake is not a crime and the judge will instruct on  
11 the law. This is what Michael Balboa was explaining to people,  
12 the basis of his rise of the Nigerian oil warrant was in 2008,  
13 the person would know and what also happened is De Charsonville  
14 said that he believed that money was accumulated in some excess  
15 collateral account.

16 Look at this. So he explained to you he believed the  
17 balance in the excess account increased as the prices of oil  
18 increased. In 2008 he didn't come up with this concoction now.  
19 Look at what De Charsonville said. He said, OK, we'll leave it  
20 at that. Mr. De Charsonville spoke to that as well. It's in  
21 the testimony. He actually said he saw a description of that  
22 on the Bloomberg with his own eyes, OK, and that's what he said  
23 that De Charsonville and this might be it -- told the  
24 government believed Mr. Balboa when he told you that the excess  
25 collateral account said that he believed him and that's what he

DCHAABAL4

Summation - Tacopina

1 told the prosecutor.

2 In any event, what happens here is if it's wrong and  
3 you have to understand that if he's wrong that is not a crime.  
4 If he had a good faith basis to make a valuation that is not a  
5 crime and the government has to prove that he was not acting in  
6 good faith beyond a reasonable doubt and the burden is on them,  
7 obviously, and you'll see how they haven't satisfied the  
8 burden.

9 First of all, when these Nigerian oil warrant  
10 methodology the pricing was so complicated the Nigerian  
11 government getting this wrong. Dr. Muhtar told us that it was  
12 a dense complicated document that needed a lot of reading, OK.  
13 He said but the debt office was clear. Mr. Balboa was not in  
14 the debt office of Nigeria in 2008 and he didn't have advisors.

15 Secondly, he is not a lawyer, not sophisticated in the  
16 reading of these documents. These are documents from a  
17 Nigerian offering memorandum. And Mr. Muhtar told us that  
18 there were times when the Nigerian government didn't know how  
19 to value these Nigerian oil warrants. By the way, what he said  
20 was as a result of default the Nigerian government, we never  
21 heard that the additional one money, what was or how much it  
22 was but Dr. Muhtar agreed that additional interest was payable  
23 to the warrant holders.

24 The bottom was collateralized -- one moment and look  
25 at this. The bottom was collateralized. Dr. Muhtar and

DCHAABAL4

Summation - Tacopina

1 Mr. Knapp both acknowledged that Nigeria's obligations under  
2 the warrant were pari passu to the bond on equal footing to the  
3 bond. Dr. Muhtar told us that the document does not say  
4 specifically what happens, the effect of Nigeria's retirement  
5 of the bond because he doesn't tell us what the effect is. He  
6 doesn't know, the document doesn't say it. It is not even  
7 agreed he didn't know whether according to his examination does  
8 the information memorandum discuss the fact of Nigerian's  
9 retirement of the bond -- it doesn't -- it's silent to that.  
10 It's silent to that.

11 So look at this Mr. Dubin yesterday cross-examined  
12 Mr -- or examined Dr. Muhtar again. Remember this chart he  
13 drew with these four little boxes and Dr. Muhtar went through  
14 this with him. Let's start out with this. The warrants were  
15 attached to the bonds. That's the first thing that happens.  
16 Those two are attached. This is the Nigerian oil warrants and  
17 the bonds. The Nigerian government had an excess crude account  
18 that was building up cash and they also had treasury bills that  
19 were originally there to secure the bonds. Dr. Muhtar told you  
20 that and then they had this excess crude account, crude oil.  
21 That was there building up cash as the Nigerian government sold  
22 more and more oil.

23 When the Nigerian government Dr. Muhtar told you  
24 decided to sell the bonds, the money in that excess crude  
25 account was used to buy those bonds back, therefore,

DCHAABAL4

Summation - Tacopina

1 extinguishing the bonds. They were gone. All that was left  
2 was those three things. Now the treasury notes were not needed  
3 any longer. So at that point they're sold off and the money  
4 from those proceeds go into this excess crude account and all  
5 you have left at that point from anyone looking from the  
6 outside in is the warrants and the excess oil account, this  
7 excess crude account. That's all you have left. What else is  
8 there? The Bloomberg screen shot, if you look at that, some of  
9 that we had to cull one from Bloomberg. We put it no evidence.

10 Let's look at that. It says there are two prices  
11 listed for these Nigerian oil warrants. And what it does next  
12 is it says that it's capped at \$15 per payment and that would  
13 be no reason to list the accumulating amount over that per  
14 right if the only amount due was \$15. In 2007 there were 13  
15 more years of payments left before we got to 2020, obviously.  
16 If most of the warrant holders were entitled to, the most they  
17 could be entitled to is \$30 a year. The most they could be  
18 entitled to is \$30 a year and that the most their rights would  
19 be worth is \$30 a year, times the thirteen years or \$390. And  
20 Mr. Cowley just said on summation anything over \$390 must be a  
21 fraud because it can't be possible. That's not true. And  
22 that's not the only interpretation that was out there because  
23 look what happens here.

24 Despite that payments being capped and the ceiling  
25 being at 390, what does Bloomberg list on their own lists, on

DCHAABAL4

Summation - Tacopina

1 their own screen shot of Nigerian warrants a price of \$445  
2 plus, OK. And by the way, that's more, obviously, than the  
3 ceiling. I guess according to Mr. Cowley that must be fraud.  
4 He said any price over 390 is fraud and it wasn't just there  
5 for Michael Balboa to see and come to the conclusion just  
6 there. There was excess crude account that we just showed you  
7 that only had warrants. There was only Nigerian oil warrants  
8 in this excess crude account hanging out there.

9 MR. COWLEY: Objection.

10 THE COURT: Overruled.

11 MR. TACOPINA: De Charsonville told you that he saw a  
12 description of excess collateral account on Bloomberg. He  
13 believed that the money was accumulated in the excess  
14 collateral account, right? Yes, there's a description on  
15 Bloomberg that's a description De Charsonville said he saw back  
16 in 2008. So in the end by the way, if Mr. Balboa  
17 misrepresented this to mean over the \$15 by annual payment as  
18 the price of oil was skyrocketing and the bonds were all gone,  
19 that misinterpretation is not a crime. He had a legitimate  
20 basis, that is what he wrote in this document back in 2008,  
21 2009, 2010, not in 2013 when he is on trial trying to come up  
22 with an answer. And you can be sure that these factors -- and  
23 by the way, if the Nigerian government would not be at all  
24 happy, obviously, if they knew that anyone was taking a  
25 position that they owed money to warrant holders, a lot more

DCHAABAL4

Summation - Tacopina

1 money, so Mr. Muhtar didn't take that position. Of course, he  
2 still wants to work for the Nigerian government. Putting that  
3 aside, this is what's out there for people to see.

4 And then we had, of course, Mr. Oshilaja and whether  
5 he was asked questions about having the specific conversation  
6 with Mr. Balboa about selling back the warrants to the Nigerian  
7 government at a higher price and whether they had any reason to  
8 deny that he was double dealing behind the Nigerian  
9 government's back. He said absolutely not. Keep in mind on  
10 cross-examination what Mr. Dubin showed him.

11 First of all, he admitted when he sat down with the  
12 prosecution that when he said to you that that conversation  
13 with Mr. Balboa never happened. But he told the prosecution  
14 back in April of this year, well, I am pretty sure it didn't  
15 happen. I am pretty sure. That's what he said about it. I am  
16 pretty sure. If you are absolutely certain about something  
17 seven or eight months earlier, pretty sure it didn't happen.

18 Look at this. First in March of 2007 Mr. Oshilaja has  
19 this PowerPoint presentation. These are in evidence. And in  
20 this presentation that he is using to try and get partnerships  
21 with funds because of his high level contacts he said I  
22 arranged investments for the fund exclusively. He then  
23 forwards the same month he forwards to Michael Balboa,  
24 Mr. Oshilaja does, this e-mail from the Central Bank of  
25 Nigeria. And what he is doing here is touting his connections,

DCHAABAL4

Summation - Tacopina

1 showing that he as an e-mail with an official at the Central  
2 Bank of Nigeria which Oshilaja was giving his views. He  
3 forwarded that to Millennium and he said I am the man. I have  
4 those connections. Then his resume he sent to Millennium, I  
5 have to high level contacts. So he is trying to do this deal  
6 that's referencing Michael Balboa's writeup, that's Government  
7 Exhibit 1553. That's' exactly what's here. And then there was  
8 a discussion clearly about a possible deal here. He was  
9 speaking to the Nigerian government about things that he would  
10 do with Millennium. Look at what happens when Mr. Dubin asks  
11 him these questions.

12 So what was he doing? Pulling the wool over  
13 Millennium's eyes and that's what it purports to be. That's  
14 what Government Exhibit 1553 speaks to. And look, let's  
15 just -- this is the things we showed you before Michael  
16 Balboa's right if the price of warrants of 2007 he talks about  
17 here, you can see this highlighted stuff the idea of  
18 collateral/oil trust and we heard about crude being oil. Put  
19 that aside. Here, November 2007 Millennium was contacted by a  
20 local Nigerian named John Oshilaja wanting to part up -- at a  
21 thousand or two thousand or more giving the  
22 over-collateralization of the crude of the oil trust.

23 This is what he said based on those e-mails you saw  
24 Oshilaja sent to Millennium that Oshilaja said, well, that's  
25 not correct. Well, that's what the e-mails say but that's

DCHAABAL4

Summation - Tacopina

1 still not correct. So who is Mr. Oshilaja lying to or  
2 pretending to? Millennium? Was he trying to convince  
3 Millennium to do some deal or was he going to do a deal?

4 And, again, if he was so far off on the pricing  
5 Mr. Balboa, understand he had a basis for this. If he was no  
6 far off why did one person over the years say to him over that  
7 whole year say to him what are you doing? Are you crazy?  
8 Three thousand? \$1500? Are you nuts? Not one person -- look  
9 at all the people who laid eyes on that thing. You had the  
10 people at GlobeOp. They have no problem accepting it. They  
11 had access to others. You had the people at BCP and they're  
12 not De Charsonville and Pratt. But Emanuel Gil but also the  
13 guy at Mint, Mr. Goddard, who Mr. Pratt went to. That's  
14 another emerging market, the people at Millennium, look at it.

15 I mean you heard at that time all Michael's Balboa's  
16 team. You saw them listed on that thing. Michael Balboa's  
17 boss, directors of the fund, speaking to Joe Struble by the way  
18 in which when they were trying to show you -- e-mails were real  
19 offers. The only thing important on there that no one  
20 mentioned, if those were real offers Joe Struble was CC'd on  
21 that too. If he would have thought those were real offers he  
22 would have said to Balboa look at this, we could buy these  
23 things that \$200, they're worth a thousand, two thousand, three  
24 thousand. What a great deal. Go buy it. Joe Struble didn't  
25 bite on that either. Joe Strubel would have said what are our

DCHAABAL4

Summation - Tacopina

1 valuations up here for if these valuations are here? You never  
2 heard that from Joe Strubel. He is CC'd on that e-mail.

3 Aside from the people at Millennium, what else also  
4 happened was this, folks, there was an annual audit which was  
5 required by law and, of course, you heard the audit. According  
6 to Ms. Gibson-Stark the audit never uncovered any allegations  
7 about Mr. Balboa was committing fraud, an audit by an  
8 independent auditor.

9 So, in the event Mr. Balboa misunderstood what the  
10 warrants holders would do -- by the way, the maturity date is  
11 in 2020, OK. We don't know if he was right. He believed he  
12 was right. We won't know if he's right for another seven years  
13 or so as we sit here today, OK. But if he believed that and he  
14 was wrong, that misinterpretation is not a crime. He was so  
15 open and notorious about his price he wasn't hiding it from  
16 anybody. And the judge is going to instruct you on good faith  
17 and please, please listen to that.

18 How am I doing on time, your Honor?

19 THE COURT: Another half an hour.

20 MR. TACOPINA: I am probably saying a lot of things  
21 that most of you know and may know already. If I am saying  
22 things that you like, I don't know what you all know and I just  
23 can't take a chance that I am not going to say something that's  
24 important enough to him just, please, bear with me. I have  
25 another half hour left.

DCHAABAL4

Summation - Tacopina

1           So here now I want to briefly talk about these warrant  
2 offers. I mentioned already Joe Strubel on this e-mail. They  
3 tried to show you that Mr. Balboa didn't really believe they  
4 are worth as much as he said they were because he didn't buy  
5 them from Exotix in that offer. You were told by the witness  
6 from Exotix that the e-mail messages blasted out by -- were  
7 like spam. They were subject to call. Subject to call is very  
8 simple. They don't even own the assets. They are just  
9 throwing out numbers on an asset that is traded a couple  
10 hundred times a year. We don't know. Balboa received those  
11 messages if he even opened them we know he as a busy trader  
12 would receive hundreds and thousands of messages a day. The  
13 Bloomberg messages were told scroll down. Ms. Molberg said  
14 that Mr. Strubel ran the high yield fund. The fact he didn't  
15 buy any speaks volumes.

16           By the way, there are so many conflicts in this case,  
17 ladies and gentlemen, so many confusing concepts that my brain  
18 is fried after two weeks of this stuff. This is not for me.  
19 But let me say this. People sort of who lived back in the day  
20 who lived this stuff like Mr. intergalactic and Mr. McNally and  
21 all these people who actually understand this and breathe it,  
22 Mr. Charlesworth, they all had different answers about what  
23 different things meant. They all had different -- how is he to  
24 be held? They want you to look at in hindsight Monday morning  
25 quarterback. If there's confusion if it's not crystal clear,

DCHAABAL4

Summation - Tacopina

1 please, do not hold that against Mr. Balboa. Hold that against  
2 the government. They have a burden to prove his guilt beyond a  
3 reasonable doubt. So if you are scratching your head saying I  
4 don't understand something or that piece of evidence or that  
5 proffer, that's a reason to doubt it in and of itself and this  
6 whole issue is so far fetched and ridiculous it's sort of  
7 trying to distract you from the issues at hand because it's not  
8 a close call on the other issues, on valuation he had a good  
9 faith basis to argue what he believed and he told everyone he  
10 wasn't hiding it. He didn't do anything wrong. So then must  
11 be the coverup to show he must have thought he was guilty.

12 Not so fast because if they can't prove the fraud they  
13 are going to say why did you cover it up? Ladies and  
14 gentlemen, there is no coverup. Let's be clear about  
15 something. The authorities, regulators, whoever were not  
16 closing in on Mr. Balboa in 2010 when he was having these  
17 conversations with Nesti or De Charsonville, they were not  
18 there in 2010 during these conversations. You heard that FSA  
19 first notified they were conducting an investigation in  
20 February of 2011. So in 2010 when he was having these  
21 interactions there was nothing going on regarding an  
22 investigation that he was worried about.

23 And in the fall of 2010 all that was happening was  
24 this. Millennium was asking Mr. Balboa to get other people to  
25 verify the pricing including counter-parties who GlobeOp

DCHAABAL4

Summation - Tacopina

1 accepted the numbers from. Remember the fund was liquidated at  
2 this point and the liquidators were becoming curious and  
3 litigation started to ensue and finger pointing began. So  
4 think about that. Think about the importance of what I just  
5 said to you. It was Millennium and Ms. Gibson-Stark said it  
6 and it's in the record. It was Millennium who asked Mr. Balboa  
7 to go get counter-party numbers two years later in 2010. He  
8 was doing what Millennium asked him to do.

9 Let's look at Nesti very quickly. Nesti claimed that  
10 Mr. Balboa told him not to mention Mr. Balboa's name on  
11 Millennium calls. Think about how ridiculous that statement  
12 is. It was Millennium who asked Mr. Balboa to go to these  
13 counter-parties to get pricing. That was consistent with  
14 Millennium's pricing and Balboa's pricing from 2008. What  
15 Millennium asked him to do was get pricing and Mr. Balboa said  
16 he would do that and fax it in. So, of course, the fact that  
17 Millennium was asking Balboa to do it means that he nothing to  
18 hide by doing it.

19 Number two, Balboa told Nesti that Millennium would be  
20 quoting him according to Mr. Nesti. So what was Nesti supposed  
21 to say when he sent the fax if he couldn't mention Balboa's  
22 name. Sir, who are you? Why did you send us a fax? Oh, I  
23 don't know. Just wanted to talk to you about the prices of the  
24 warrant ridiculous. Of course Millennium would know that  
25 Michael Balboa reached out to him. He was the portfolio

DCHAABAL4

Summation - Tacopina

1 manager of this fund and that's what he was doing. So there  
2 was no secret about it. Mr. Nesti tried to give you some  
3 impression. Don't mention my name. It's ridiculous. It  
4 wouldn't make sense. He fluffed Mr. Nesti. The reason we went  
5 through that long grueling hour of cross-examination with him  
6 which was not fun to do in Italy in a room that was  
7 100 degrees. That was beside the point. He was fluffing his  
8 credentials. He was pretending he is this big oil guy. It was  
9 like he was a broker -- the world. It want like he was this --  
10 hey buddy, do me a favor. His credentials, at least the way he  
11 said, it were substantial, OK. And he was purported to be an  
12 expert on oil. We know that wasn't true. But if you get the  
13 benefit of that hindsight. And, again, he was the one who  
14 worked there nine years ago at this desk at Greenwich and if  
15 there was no proof of a scheme to coverup anything at all which  
16 there wasn't Mr. Balboa said something to him, folks, and this  
17 is just consistent with everything else he did in this case.  
18 He said here is the price, Leo. Only send them if you're  
19 comfortable and confident that they're right. Think about that  
20 statement for a second. There's a scheme to coverup, another  
21 scheme to cover up -- was saying the opposite. Nesti admitted  
22 that. It's in the tape. It is in the transcript.

23 And by the way, then he said about this De  
24 Charsonville had this conversation with him, right, where he  
25 said, you know this coverup where he went and met him at

DCHAABAL4

Summation - Tacopina

1 London, went to his office and what he admitted Mr. De  
2 Charsonville and that Balboa didn't ask him to find people to  
3 coverup a scheme or get someone to confirm inflated numbers.  
4 De Charsonville said Balboa never said that to him.

5 Then he said this thing about these damning e-mails.  
6 De Charsonville told you about the damning e-mails. First he  
7 admitted having given them to him in his office, in the lobby  
8 in prior testimony. Balboa gave him these damning e-mails. So  
9 he shifted his version. He gave me the e-mails in a restaurant  
10 a table or two, quiet thing. Everything you know about this  
11 guy De Charsonville, everything you know, can you believe him?  
12 The guy said he's an admitted liar. Even though they didn't  
13 know he was lying, every single person. How are you supposed  
14 to be able to tell when he's lying? They told you about this  
15 e-mail that Mr. sent to De Charsonville. I think they put it  
16 up here with the Fed Ex thing, the package. And then there was  
17 e-mail -- they tried to put some slant on that like it was  
18 Balboa sending it to his wife's e-mail address. De  
19 Charsonville told you in the testimony he said, I don't know if  
20 it was me or Balboa who suggested that. I don't remember.  
21 Clearly, there's no conspiracy because there's no agreement.

22 These guys were quick to be in a scheme with  
23 Mr. Balboa when they needed to that they were terrorized to  
24 saying they were doing something wrong, the government wouldn't  
25 go away. Well, wait a second. All I have to say is I did

DCHAABAL4

Summation - Tacopina

1 something wrong and all this goes away? Look at this. This is  
2 sort of an evolution chart. Look what happens first. In 2011  
3 De Charsonville met with the SEC in March of 2011 he said he  
4 did nothing wrong and Balboa did nothing wrong. By the way, if  
5 he is lying there he is a lying to federal officials that's a  
6 crime and he acknowledged that.

7 Then December of that year there was a criminal  
8 complaint filed against Michael Balboa. Now look what happens  
9 next. About a month later he sends his lawyer in to meet with  
10 the prosecutors to say I want to cooperate. When he wants to  
11 cooperate his story is I didn't do anything wrong and Balboa  
12 didn't do anything wrong. But he was still saying he did  
13 nothing wrong. He didn't get his agreement.

14 Again, so what happens next? He meets with the  
15 government in Madrid, Spain. This time knowing that  
16 Mr. Balboa's trial's coming up and this time I did something  
17 wrong. What happens when he says that? Balboa signs a non  
18 prosecution agreement, gets a free pass waltzes in and out of  
19 here, lied to the SEC but no problem. He just leaves and gets  
20 hired jobs. He lies on his job interviews, no problem. Again,  
21 not even a scratch on his license, non prosecution agreement  
22 when he changes his story.

23 And you know remember in that non prosecution  
24 agreement something that's important he said only if he tells  
25 the truth. It's not exactly like he is put on a lie detector

DCHAABAL4

Summation - Tacopina

1 box and the government's exhibit box determines if he tells the  
2 truth or you get to vote on that. They get to decide if he is  
3 telling the truth. So it's their truth that he has to tell.  
4 If he doesn't tell their truth he doesn't get a non prosecution  
5 agreement.

6 THE COURT: The jury will determine whether he is  
7 telling the truth.

8 MR. TACOPINA: Of course. But that's a factor to  
9 consider in his agreement in order to get a non prosecution  
10 agreement he has to tell the truth as determined exclusively by  
11 the prosecutors.

12 Now, one thing I want to show you, just to show you  
13 how willing he was to please and go along with the  
14 prosecution's desire, one example there was that tape that was  
15 played, OK. It was Government Exhibit 863. I am not going to  
16 play it now. But basically the one where Mr. De Charsonville  
17 said I swore when I heard that I heard Balboa's response to him  
18 discussing warrant price. I heard him say it's a little low.  
19 Well, that didn't quite work out. And that's what he said, OK.  
20 Yes, that's what I heard then. At this proceeding he said he  
21 heard Telulla, Telulla, Michael Balboa's daughter. You could,  
22 if you have ears you could hear that. Why is that important?  
23 What's important is the last trial the prosecution heard it's  
24 too low, it's too low. They showed it to Mr. De Charsonville.  
25 This trial when it was corrected properly --

DCHAABAL4

Summation - Tacopina

1 THE COURT: You mean the prior proceeding.

2 MR. TACOPINA: The prior proceeding. In this trial,  
3 at a prior proceeding then at the trial here when Mr. De  
4 Charsonville looked at it what he heard was Telulla, Telulla.  
5 If it said Mack truck, Mack truck, he would have heard Mack  
6 truck, Mack truck. He is pleasing his master because they hold  
7 the carrot over him. That's an example of what he will do to  
8 please them and to get out.

9 Listen to what he says about his lying and what not.  
10 He says, well, when you say lie you start believing your lies,  
11 yes? Yes. And he also testified that when you convince  
12 yourself that your lies are the truth you are not just lying to  
13 everyone else, you are lying to yourself, right? Yes. So this  
14 is the man who originally said he did nothing wrong. Then the  
15 story changed and now we have the lies. He's convinced  
16 himself.

17 And there are certain stubborn facts that Mr. De  
18 Charsonville's lies can't hide from. De Charsonville admitted  
19 that Michael Balboa never asked him to participate in a scheme,  
20 whatsoever. These guys were social friends. They didn't know  
21 each other. They were going to hook up on the phone and  
22 decide -- they were going to -- orally and Balboa never said to  
23 him, I want to give you false prices or I am going to pass on  
24 to you false prices, never did anything like. He never asked  
25 De Charsonville to lie for him, ever. Never -- SEC deposition.

DCHAABAL4

Summation - Tacopina

1 De Charsonville told you that. Never saw in one of those  
2 e-mails that the prosecution put up, Government Exhibit 511,  
3 512, 513, 510, never saw anything saying don't tell GlobeOp I  
4 gave you the numbers. Michael Balboa did that with others and  
5 other securities and also did it with GlobeOp too and you saw  
6 that exhibit.

7 When Mr. De Charsonville was asked you made an  
8 agreement to commit a crime with Mr. Balboa? There was no  
9 written agreement. But in my view there was an understanding  
10 in my view. So that's it, Mr. De Charsonville had a view that  
11 now suits his needs. So now he is not going to be prosecuted  
12 and he is not sitting at a table. This was all in De  
13 Charsonville's mind. If he even believed that and didn't just  
14 make it up to avoid being prosecuted that is all in his mind  
15 because when asked if he intended to defraud -- this is a  
16 little fact that snuck out, this little gem. When he did the  
17 same thing with Mr. Balboa remember in 2007 he did the same  
18 thing with the Nigerian oil warrant. He couldn't find any  
19 prices for it so he just passed them on. Look what he said in  
20 2007 there came a point where you couldn't find --

21 How could that be? That's the same thing he did in  
22 2008 cause the charge in this case only goes from January 2008  
23 to October of 2008? So the same thing he was doing in 2007 he  
24 wasn't doing a crime? So ridiculous. This guy doesn't think  
25 he did anything wrong, clearly. Think about this. When De

DCHAABAL4

Summation - Tacopina

1 Charsonville said to Emanuel Gil, when De Charsonville couldn't  
2 do the mark to market for Balboa for the warrants in August, De  
3 Charsonville claimed that he was in a criminal conspiracy with  
4 Balboa and didn't know anything about it. He exposed someone  
5 else at BCP to his criminal scheme who was a part of the scheme  
6 and holds himself out as emerging market specialist. That  
7 doesn't make any sense at all. If De Charsonville really  
8 thought he was doing something wrong he never would have turned  
9 someone else on at his own companies who knew emerging markets.

10 If there really was some criminal conspiracy when De  
11 Charsonville said to Michael Balboa, hey, Michael, send your  
12 Nigerian oil warrant prices to Manuel Gil, Mr. Balboa would  
13 have said Charles, what are you crazy? He will know that this  
14 is nonsense. I am not sending him those prices. Only you and  
15 I are doing this. Nothing happened. Do you know what Balboa  
16 did? He sent it right to Manuel Gil. When you informed Balboa  
17 to send the warrants did he say, are you crazy? No. He sent  
18 them to Gil and you learned that Gil then sent them on to  
19 GlobeOp. GlobeOp saying they look fine to me. Now they are  
20 trying to criminalize and make it sinister. Secret from who?

21 If you know then he said this thing about Peter  
22 Bartlett and he sent him a price cause he thought the price  
23 was, he was concerned so he sent Peter Bartlett a price in May  
24 of 2008. Now, if this conspiracy scheme supposedly started in  
25 January of 2008, think about it. De Charsonville said I knew

DCHAABAL4

Summation - Tacopina

1 when he was passing offer these prices in January of 2008, why  
2 in May is he trying to verify Balboa's price with somebody  
3 else? Cause it didn't happen. There was no conspiracy. There  
4 is no scheme. If he were doing this in January of 2008  
5 illegally and improper he won't be trying to check in with  
6 somebody else which he did with this Peter Bartlett.

7 By the way, you heard a stipulation in 2008 was in a  
8 stipulation Quadruple Z, he thought that Bartlett's prices were  
9 wrong and Balboa's prices were right. Now he said today,  
10 balboa's prices were wrong and Bartlett's were right. Again,  
11 it's all in evidence all there. This guy wasn't getting paid  
12 to do this. None of these people were getting paid. They  
13 weren't getting anything from Balboa. No one as extorted. Sam  
14 Pratt again is someone who he said he lied. Never charged with  
15 anything. Got his non prosecution agreement, decided to tell  
16 the truth so he didn't get prosecuted.

17 He said first to you his prior testimony at a prior  
18 proceeding was accurate, OK. Then what happened was he started  
19 getting caught up in things that a little different than what  
20 he said under oath before he said I was nervous. But then I  
21 said are you nervous now? How do you tell which one was right?  
22 If he was wrong before cause he was, if he's -- how do you tell  
23 which one is right?

24 Just some things Pratt said now, no meeting of the  
25 minds just like with Manuel Gil. The evidence is this is again

DCHAABAL4

Summation - Tacopina

1 the best evidence that there was no conspiracy because if you  
2 are in a conspiracy it's a secret agreement as Mr. Cowley said  
3 secret. You don't bring people in the secret agreement  
4 conspiracy who can blow the cover off of it. You just don't do  
5 it. That's what Pratt did with Goddard at Mint. It doesn't  
6 fit at all. He shows Goddard the prices and he said you heard  
7 testimony that Goddard knew those prices were coming from  
8 Balboa and passed on to GlobeOp.

9 Again, you'll see the e-mails, initially, that there  
10 was an e-mail from Mr. Pratt to Balboa in January of 2008. He  
11 wrote to Balboa saying, OK. I'll hold off doing anything.  
12 This is the first month in 2008 that's the pricing. Hold on  
13 doing anything including getting the prices until they speak  
14 again. In this scheme why is Pratt worried about getting  
15 prices for? That is not what they were thinking in 2008  
16 because that's not what it was.

17 Pratt also told you that he had no problem and of  
18 course that Balboa was able to give his problem -- Pratt said  
19 that he can't make prices. Pratt said but he can certainly  
20 tell you I believe that's five hundred. I believe that's two  
21 hundred. That's, of course, what he did. And even after he  
22 started cooperating he still told prosecutors he thought that  
23 Balboa's prices were good. So how could that be a meeting of  
24 minds?

25 Again, Pratt told you he trusted Balboa. What he also

DCHAABAL4

Summation - Tacopina

1 did was send an e-mail to his compliance officer saying oh,  
2 should I pass this on. Are you crazy? If this guy was  
3 involved in a criminal conspiracy knowing he was passing on  
4 false numbers he was going to pass on to his client officer,  
5 are you guys okay with this? Now that you are fired you get  
6 arrested, nothing happened to him then, OK. He never would  
7 have sent that to his compliance officer, goes to show his  
8 state of mind after he stopped doing anything with Balboa. In  
9 April he said I don't want to do this any more. What did  
10 Michael Balboa say to him? He simply said, no problem. I am  
11 OK with that. And then what happens? A year later they go off  
12 to Germany. He flies Balboa to Germany. He introduces him to  
13 two of his clients so Balboa could do business with him.

14 Let's go to this. We're going to go through these  
15 five charges real quickly. In this case you would expect to  
16 see when you talk about Michael Balboa's state of mind. You  
17 would expect to see evidence and agreement of some sort. What  
18 actually happened? There is no evidence of an agreement  
19 between Balboa and Pratt, Balboa and De Charsonville at all.  
20 What you would expect to see if this was a fraud is Balboa  
21 telling him don't check the prices I give you. No discussion  
22 of checking prices. What actually happened in this case, no  
23 suggestion by Balboa not to check the price. What you would  
24 expect to see if this is a fraud you don't have counter-parties  
25 like Pratt and De Charsonville actually checking Balboa's

DCHAABAL4

Summation - Tacopina

1 prices. What you saw in this case is they repeatedly checked  
2 his prices. Pratt said he did it every month. What you would  
3 expect to see if this was a fraud of his state of ind was  
4 criminal. There would be knowledge that the prices are wrong  
5 what actually happened, these guys had no idea, told you  
6 whether the prices were wrong or not. If there is a criminal  
7 agreement you would, expect to see Balboa saying to don't say a  
8 word to anyone else. What happened here is this is done openly  
9 and transparently. The recorded calls and, of course, Balboa  
10 knew the calls were recorded. They were recorded calls and the  
11 e-mails. They were sent from his work e-mail. Did you think  
12 they were going to blow up and disappear? What you would  
13 expect to see is Balboa getting angry when those two guys  
14 involved others. What you saw when Balboa was asked to send  
15 something to Gil no reaction and he complied and sent his  
16 numbers to Gil.

17 What you would expect to see is Balboa getting angry  
18 and frustrated when Pratt pulls out. What you got was the  
19 opposite of that, no consequences, whatsoever, to that. Mint  
20 stays as a client of Millennium. What you would expect to see  
21 if the scheme ends in October of 2008 or April as it were for  
22 Mr. Pratt communications end. What you get here is these guys  
23 continuing to do introductions doing new business deals and  
24 going on and so forth.

25 THE COURT: Four minutes left.

DCHAABAL4

Summation - Tacopina

1 MR. TACOPINA: Thank you, your Honor. I could list 50  
2 reasonable doubts in this case for you. I tried to spend two  
3 hours talking to about a lot of them. This is a quick hit  
4 list. Any one of these is enough. Michael Balboa's  
5 involvement in the valuation processes was disclosed to  
6 investors. Balboa never asked or agreed with De Charsonville  
7 or Pratt to inflate the value. That's a fact. Balboa never  
8 had a negative reaction when Pratt no longer wanted to give  
9 counter-party marks. Pratt and De Charsonville conducted due  
10 diligence on Balboa's pricing. That wouldn't make sense.  
11 Pratt tries to conduct business after the scheme. GlobeOp  
12 never questioned Balboa on these prices once until October.  
13 And when he did there was not any kickback from Balboa or  
14 anyone else. That's when the fund was being liquidated.  
15 Others at Millennium would check Balboa's pricing. It wasn't  
16 Balboa in his only little fund in his basement. Not one penny  
17 of performance -- ever point for the increase of warrant is  
18 nothing for his pocket.

19 These charts and grafts that you saw were so distorted  
20 that even the judge is going to instruct you on good faith and  
21 I need you to please let's come to the end of it. What you are  
22 going to hear is good faith on the part of Mr. Balboa is  
23 complete defense to all the charges against him. Please listen  
24 carefully when you hear the judge mention good faith in the  
25 charge.

DCHAABAL4

Summation - Tacopina

1           The government is going to go last they are going to  
2 get rebuttal. Again, that's because they have the burden. I  
3 can't respond to them but you can on my behalf but you could  
4 think what my response would be based on the evidence. You are  
5 now at the point when we're done here today that you are going  
6 to pass on Mr. Balboa's reputation, his future. It's important  
7 that you do this as perfectly as possible. With complete  
8 independence, with nothing to influence or control your inner  
9 guidance and your conscience. You took these oaths that I know  
10 you took seriously. And these oaths are taken to uphold the  
11 Constitution and the laws of this country and government.

12           The prosecution has a heavy burden to prove a case  
13 beyond a reasonable doubt against one of its citizen. And if  
14 you hold them to that heavy burden in this case and you are  
15 really satisfied with your verdict, we will be too.

16           It's been my privilege to represent Michael Balboa  
17 and, obviously, it was an important moment in his life and I  
18 would like to thank him for putting his confidence in me at  
19 this time.

20           Years from now folks when you are laying in bed or on  
21 an airplane or something when you are contemplating what you  
22 went through here, what you do here can never be undone, so  
23 gives us the attention and the seriousness it deserves because  
24 there is no turning back the hands of time. You can't say you  
25 know what? That didn't make sense. You know what? I don't

DCHAABAL4

Summation - Tacopina

1 feel right relying on the words of people that didn't read the  
2 documents before they came in here to tell me what those  
3 documents meant. I can't rely on the testimony of witnesses  
4 who turned 180 degrees to avoid sitting where he is sitting  
5 right now. Or if you just get a feeling that something is  
6 missing or something is not right, that is reasonable doubt  
7 coming out live and well. I beg you to end this nightmare on  
8 behalf of Mike Balboa and thank you for your patience.

9 And, your Honor, thank you.

10 THE COURT: Thank you, Mr. Tacopina.

11 Why don't we take a ten minute recess and we'll then  
12 finish up with the government's rebuttal.

13 (Jury not present)

14 THE COURT: We'll resume as close as we can to one  
15 o'clock.

16 MR. MILLER: Your Honor, I have 35 minutes. Is that  
17 correct?

18 THE COURT: I think Mr. Cowley went from 9:07 to  
19 10:37.

20 MR. COWLEY: We clocked it at an hour and 27 minutes.

21 THE COURT: 30 minutes.

22 (Recess)

23 (Continued on next page)

DCHUBAL5

Rebuttal - Mr. Miller

1 (Jury present)

2 THE COURT: All right, Mr. Miller.

3 This is the government's rebuttal.

4 MR. MILLER: Thank you, your Honor.

5 Everyone is lying. The exhibits are lying. The  
6 recordings with the defendant's own words are misunderstood.  
7 It is all one big frame job by the government.

8 This is what defense counsel wants you to believe, but  
9 as we showed in our closing statement, the evidence of the  
10 defendant's guilt is uncontroverted. When Mr. Cowley spoke  
11 with you, he took you through methodically, the evidence  
12 showing that the defendant conspired or agreed with others to  
13 undermine the independent valuation process and inflate the  
14 price of the Nigerian warrant. And he also showed you how the  
15 defendant undermine the independent valuation process and  
16 inflate the prices of the Nigerian warrant in Millennium's  
17 hedge fund.

18 Mr. Tacopina tries to make this case much more  
19 complicated than it actually is. And I will get to his  
20 arguments in a moment, but I want to say a few things  
21 generally.

22 Now, the defense has no burden. The government has  
23 the burden of proving the defendant guilty beyond a reasonable  
24 doubt. We are happy to accept that burden. We believe that we  
25 have met it. But when a defense lawyer makes arguments to you,

DCHUBAL5

Rebuttal - Mr. Miller

1 you are allowed to use your common sense to scrutinize those  
2 arguments. I would like to do that right now.

3 Throughout this trial, the defense, in cross-examining  
4 witnesses and in direct examination of witnesses would say X,  
5 with one witness and then try to seem like it is not X with the  
6 next.

7 You can consider this in determining whether those  
8 argument are credible to you, whether they are able to  
9 withstand scrutiny.

10 Right at the top, I want to address a couple of things  
11 that Mr. Tacopina just did. And when he was explaining to you  
12 over the last couple of hours of what witnesses testified to.  
13 He would say generally this witness said this or this witness  
14 said that. We encourage you to go back and look at the  
15 testimony because much of what Mr. Tacopina just said is  
16 absolutely inaccurate.

17 Just to give you two quick examples and then I am  
18 going to walk through the arguments.

19 First, with respect to Mr. De Charsonville, you heard  
20 Mr. Tacopina just say that Mr. De Charsonville testified that  
21 he saw the excess collateral account on Bloomberg in 2008. Not  
22 true. In fact, Mr. De Charsonville testified that he thinks  
23 that he looked at in 2010. He never said 2008. And that makes  
24 sense and I will get to that a little later, but that makes  
25 sense considering the fact that that is when he received

DCHUBAL5

Rebuttal - Mr. Miller

1 Mr. Balboa's write-up showing, as we all know, that Mr. Balboa  
2 was lying and trying to get his lies out to Millennium and to  
3 the investigators. That's why he was saying that. That's why  
4 Mr. De Charsonville said that, and he didn't say 2008 -- never  
5 did. In fact, I asked him that question to make sure and he  
6 confirmed on the record. Your recollection controls and you  
7 have access to the testimony.

8 Second, Ms. Gibson-Stark. You just saw Mr. Tacopina  
9 during his closing put up a segment where Ms. Gibson-Stark said  
10 that you can't talk to counterparties. Well, she clarified  
11 that. She wasn't saying that he could never call up and  
12 express his opinion and say how are you doing to a  
13 counterparty, of course not. She clarified it right after that  
14 snippet that Mr. Tacopina just showed you. She said that he  
15 could talk to them. He could express his opinion. But what  
16 can't he do? He can't direct them, especially when Mr. Balboa  
17 knew that Mr. De Charsonville and Mr. Pratt had no idea, no  
18 clue what the prices were.

19 Finally, just in terms of a general overview here, Mr.  
20 Tacopina likes to point to the documents. And it was  
21 interesting because in his opening statement he said that you  
22 are going to see from the government plucking out statements  
23 from documents. And in fact that's what you have seen from the  
24 defense.

25 Indeed, there is no ambiguity here. This case is not

DCHUBAL5

Rebuttal - Mr. Miller

1 about contractual interpretations. This is not a law school  
2 class. This is about what actually happened between people on  
3 recording and emails. It is not about trying to interpret  
4 documents. The documents that you have seen, the DDQs and the  
5 offering memos are absolutely 100 percent clear. I will get to  
6 that in a moment.

7 Let me break this case down quickly. As you saw, Mr.  
8 Balboa lied about the price of the warrant, the process and he  
9 covered up those lies.

10 First, with respect to the price, you know that the  
11 highest price of a Nigerian warrant between 2007, 2008 was  
12 \$258, and Mr. Balboa knew that.

13 You heard throughout this entire trial including in  
14 opening and closing statements by Mr. Tacopina, Mr. Balboa is  
15 an expert. Well, is he is an expert or is he not? Because if  
16 he is an expert, he certainly knows what all of these prices  
17 are and it makes no sense that these prices are at 258 and that  
18 he is pushing these prices to 3,500 and 4,000 dollars to Mr. De  
19 Charsonville to feed to GlobeOp to value the funds. You know  
20 that he knew what these offers were, not only did he get 26  
21 emails with these offers -- by the way, a good percentage of  
22 which were not subject to call -- which I will get to that in a  
23 minute. He replies to them, so you know that he knows where  
24 this is being priced at, and the prices were on ALL-Q on  
25 Bloomberg. Mr. Balboa, the expert, as you heard testimony

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Rebuttal - Mr. Miller

1 about, financial professionals look at Bloomberg. Mr. Balboa,  
2 the expert, obviously, was on Bloomberg looking at this  
3 instrument. ALL-Q was accessible to him as a client of Exotix,  
4 so he saw what these prices were. And you saw also that the  
5 prices that were on ALL-Q match up with the price that  
6 Mr. Balboa knew to be true -- 200-some-odd dollars, not 3,000,  
7 4,000 dollars. There is no reason to price this warrant 18  
8 times where it was traded at, what the prices were, especially  
9 given the price cap.

10 And witness after witness, including witnesses that  
11 have no dog in this fight like Mr. Knapp and Dr. Muhtar told  
12 you, it makes no sense to price those things that high because  
13 there was no collateral in the warrant. You know this from the  
14 witnesses. You know this from the information memorandum which  
15 is clear as day and from Bloomberg. Balboa, the expert, knew  
16 this.

17 The process. You also know that Mr. Balboa lied to  
18 investors about the process. You know that Balboa used De  
19 Charsonville and Pratt to feed inflated prices to GlobeOp. You  
20 know that contrary to what Mr. Tacopina has told you,  
21 everything was not done in the open. Things were hidden from  
22 GlobeOp, and we saw a myriad of emails and the recordings and  
23 you heard evidence that Balboa didn't even realize that BCP's  
24 calls were being recorded and flipped out when  
25 Mr. DeCharsonville told him that.

DCHUBAL5

Rebuttal - Mr. Miller

1 Further, you knew that Balboa knew that De  
2 Charsonville and Pratt had no clue what the real prices should  
3 be and what the justification was for them. They told Balboa  
4 that in emails and conversations. You have written documentary  
5 evidence to corroborate that. And investors relied on the  
6 independence of the process. Remember, GlobeOp valued the  
7 portfolio. Counterparty marks are final. There are no manager  
8 marks. That is a key point. That was in all of the DDQs.

9 As I said in the opening statement, you cannot tell  
10 investors things are independently valued and then behind the  
11 scenes direct the marks, not raising issues or objections, but  
12 directing them.

13 Finally, the cover-up in 20008, Mr. Balboa is pushing  
14 Mr. Pratt to sign that audit documentation that is clearly  
15 false.

16 In 2010, after investigations commenced, he is feeding  
17 De Charsonville his reported justifications for his  
18 outlandishly inflated prices, justifications that we have  
19 proven are not only without reason but are false as Balboa, the  
20 expert, knew. Indeed, he feeds these cover-up information  
21 including the damning emails right up to 2011 after the  
22 investigation has already commenced.

23 Finally, you saw Mr. Nesti. Mr. Balboa didn't select  
24 Mr. Sequeira or UBS. Who did he go to when he wanted somebody  
25 to feed over those prices claiming to be their own, years after

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Rebuttal - Mr. Miller

1 the fact to be their own? Mr. Nesti, and you don't have to  
2 take his testimony for that. You can look at the emails. They  
3 are clear as day. The government has clearly proven  
4 Mr. Balboa's guilt beyond a reasonable doubt.

5 Mr. Tacopina ignores the recordings. He ignores these  
6 emails saying that De Charsonville and Pratt have no clue about  
7 these prices, and he mitigates the importance of the cover-up  
8 which you all know why it is extremely important.

9 I want to say a couple of things about and respond to  
10 a couple of quick points that Mr. Tacopina raised in his  
11 closing and then I want to go to a couple of themes.

12 First, the investors read the documents. Some of  
13 these guys had teams of due diligence teams who went and looked  
14 and reported that, and you heard testimony about that.

15 You also heard testimony from Mr. McNally and others  
16 that were personally invested -- not just retirees' money,  
17 pension moneys, but also their personal investment and they  
18 looked at the documents.

19 That whole handwritten notes "valuation -- Michael  
20 Balboa" we have no idea what that means and there is no  
21 evidence to substantiate that means that Mr. Balboa valued the  
22 fund. In fact think about that argument because this is an  
23 important argument that Mr. Tacopina likes to make over and  
24 over again, particularly both in opening and closing. If  
25 Mr. Balboa was entitled to value these marks, then wouldn't

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Rebuttal - Mr. Miller

1 this make this fund and internally marked fund where manager  
2 marks are permissible? Yet every single piece of paper says  
3 this fund, manager marks are not used, GlobeOp does the final  
4 valuation. So the defense will say, when it suits them,  
5 manager marks are OK. But then they will say that GlobeOp is  
6 the one that finally does the valuing, it is OK for Mr. Balboa  
7 to give opinions. That inconsistency is something that you can  
8 consider in evaluating defense arguments.

9 To dispense with the red herring, we don't have a  
10 problem or a dispute with the fact that Mr. Balboa could give  
11 his suggestions or his objections. What he can't do is use two  
12 people that he knows have no clue what the prices are to need  
13 his outlandishly inflated price 10 to 18 times the actual  
14 trading price to bump up the value of the NAV.

15 In terms of the charts, I don't want to spend a lot of  
16 time on this, but blue or red, it is 10 percent and 10 percent  
17 of the NAV is not only a substantial incentive for Mr. Balboa  
18 to commit fraud, it has actually a material effect on the fund.

19 The whole idea that we are doing some Monday morning  
20 quarterbacking, I think Mr. Tacopina said, with respect to the  
21 information is also another red herring.

22 The subpoenas are issued by the United States  
23 Government. The United States Government doesn't dispense with  
24 the fact that Mr. Balboa, the expert, had access to the email  
25 that he got, the Bloomberg pages, yada, yada, yada. So,

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Rebuttal - Mr. Miller

1 ultimately, the chart that says actual known trading prices,  
2 that is because those were the offering emails that were sent  
3 out, the prices on ALL-Q, the things that Mr. Balboa knew of  
4 and got.

5 With respect to Government Exhibit 204, that shows  
6 that Mr. Balboa knows that the Nigerian warrant can't be valued  
7 higher than 250, 280 dollars during this period. Yes, it was  
8 in 2007, but think about that for a second. Either there is  
9 collateral in Mr. Balboa's mind or there is not to this  
10 warrant. If there is collateral in mind, and you know that is  
11 not true from the overwhelming evidence, then in early 2007, he  
12 should be actually pricing the warrant even higher than 3,000  
13 4,000 that he is pricing in late 2008. Why? Because there are  
14 more payments that are left. Early 2007 is earlier in time  
15 than late 2008 and you got until 2020 to get payments. So  
16 that's how you know this makes no sense.

17 So ultimately and finally, on the audit issue, the  
18 audit was not of the 2008 valuations and you heard that  
19 testimony. It was not of the hedge fund either. The fact that  
20 the audit didn't catch Mr. Balboa's fraud is proof of nothing.

21 Look, I am not going to be able to cover every single  
22 argument of Mr. Tacopina's. Let's walk through a couple of key  
23 points. Obviously, Mr. Tacopina spent a considerable amount of  
24 time calling Mr. De Charsonville, Mr. Pratt, Mr. Nesti -- the  
25 insiders -- liars. They have to do this because their

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Rebuttal - Mr. Miller

1 testimony is just too damaging for the defense. They want you  
2 to believe that they are not telling the truth on the stand  
3 and, therefore, the defendant is not guilty, but that is wrong  
4 for several reasons. First, the insiders actually have the  
5 utmost incentive to tell you the truth and we will get to that  
6 in a second. We will get to that in a second. Second, they  
7 are corroborated. And you from the emails and recordings, they  
8 are corroborated.

9 Third, as I will show, even without Mr. De  
10 Charsonville, Mr. Pratt's testimony on the stand, you still  
11 know that the defendant is guilty beyond a reasonable doubt.  
12 You know this from the emails. You know this from the  
13 recordings. In fact, we submit to you that we have proved a  
14 conspiratorial agreement which I will get to in a second. Even  
15 if you find there was one, and you should, there is no question  
16 beyond any reasonable doubt, much less any doubt at all, that  
17 Mr. Balboa used Mr. DeCharsonville and Mr. Pratt to feed his  
18 prices through and to falsely inflate the NAV. So even if you  
19 weren't to find conspiracy -- and you should -- he is certainly  
20 guilty of all of the substantive counts in the indictment.

21 Keep in mind, of course, who picked these guys as part  
22 of this conspiracy. Mr. Balboa.

23 Look, it would be nice if only upstanding citizens  
24 came to testify on behalf of the United States Government as  
25 insiders but, unfortunately, that is not the way it works

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Rebuttal - Mr. Miller

1 because those aren't the people who actually commit the fraud  
2 with people who are accused of committing fraud.

3 Ultimately, Mr. Tacopina can talk about the  
4 government's motives all it wants to, but if these guys were  
5 lying, their agreements get torn up and they know that. Mr.  
6 Tacopina, well, we are the ones determining the truth, well,  
7 the thing is that these guys had no idea, no clue, if you will,  
8 whether they were going to get non-prosecution agreements when  
9 they walked through our door. Common sense tells you that.  
10 They weren't promised anything, they told you that. So if they  
11 come in and they lie, they are getting nothing and they are  
12 getting prosecuted, so they have the utmost incentive to get on  
13 the stand and tell the truth.

14 Ultimately, if they were lying wouldn't they have come  
15 up with better lies? For example, if they were lying, wouldn't  
16 they say that they had meetings where Mr. Balboa admitted  
17 everything to them and they all sat away a table and discussed  
18 this, as Mr. Tacopina likes to refer to. Oh, know, that's not  
19 what happened. So they would come up with better lies if they  
20 were actually lying.

21 And, ultimately, if, they were lying, for example,  
22 even about the cover-up aspect. Do you think Mr. De  
23 Charsonville would have gotten on the stand and said, I can't  
24 remember when I got the damning emails, if it was at this  
25 meeting in London or another meeting. Why would he say it was

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Rebuttal - Mr. Miller

1 at that lunch meeting, and then say, by the way, at that lunch  
2 meeting, Mr. Balboa said he was really worried about all of the  
3 fraud that we committed. When Mr. De Charsonville had that he  
4 saw collateral for the warrant on the Bloomberg in 2010. Think  
5 about that for a second. You know from the witnesses and the  
6 warrant, everybody told you cold, no question, there is no  
7 collateral. And Mr. Balboa, the expert, clearly knew that. So  
8 it is clear that Mr. De Charsonville, who is a salesman not an  
9 analyst or trader, is just mistaken and he is saying that based  
10 on the writeup he got in 2010. Remember he testified 2010, not  
11 2008.

12 Indeed, it is crystal clear in his testimony that he  
13 didn't see anything for the warrant in 2008 and you know from  
14 the mountain of evidence there was no collateral on Bloomberg  
15 in 2008 and 2010.

16 Of course, don't forget about Mr. Pratt who told you  
17 he wanted to stop doing any business, but then all of a sudden  
18 now he is not passing the prices on anymore in 2008, but then  
19 Mr. Balboa wants him to sign the audit request forms and he is  
20 pushing him, and he is pushing him and he is pushing him. And  
21 Mr. Pratt -- you can assess his demeanor yourself -- relented.

22 Ultimately, as to the reasons why these witnesses were  
23 offered the kind of agreements they have, that is not what this  
24 is about. The judge will tell you, that the reason the  
25 government made certain agreements with witnesses is not a

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Rebuttal - Mr. Miller

1 proper concern for the jury. You are here to decide United  
2 States v. Michael Balboa, the man who is accused of committing  
3 the crimes charged. Don't let other issues distract you.

4 As I say, of course, the cooperators are the  
5 corroborated.

6 With respect to the conspiratorial agreement issue,  
7 Mr. De Charsonville's testimony and Mr. Pratt's testimony was,  
8 this was obvious. There was no reason -- you will hear from  
9 the judge in jury instructions that you don't need an explicit  
10 agreement to form a conspiracy. It could be implicit. It  
11 could be obvious. This was obvious. Remember, of course,  
12 Government Exhibit 873. I have no idea what Mr. De  
13 Charsonville is telling Mr. Balboa, or Government Exhibit 1155,  
14 Mike, I last sent 2750 to 3200, what should I send now? Then  
15 Pratt, of course, tells you in multiple conversations with  
16 Mr. Balboa where he said, I have no clue what the prices are.

17 It can be obvious. It doesn't need to be expressed  
18 explicitly. You know Balboa is lying from the offer emails he  
19 got, the one he replied to, the ALL-Q prices.

20 Don't forget Mr. Knapp's testimony where he says --  
21 the question was: If somebody tried to tell you the Nigerian  
22 warrant for \$3,000 in September 2008, what reaction would you  
23 have?

24 He said, I am confused because that bears no  
25 resemblance to reality.

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Rebuttal - Mr. Miller

1           On this missed Bloomberg messages, you saw he relied  
2 to them, but anyway you also know there are search functions in  
3 Bloomberg. And by the way, Mr. Howard never testified about  
4 the scrolling Bloomberg messages. What he said he never used  
5 Bloomberg messages.

6           On the collateral issue, Mr. Cowley walked you through  
7 that. Dr. Muhtar's testimony is clear. The only collateral is  
8 for the bonds and that ended in 2006 and the bonds were  
9 retired. This whole excess account, and they showed you a  
10 demonstrative on that, in fact it came 10 years later. And  
11 whenever there were disbursements of it, the press reported it  
12 so that people knew, this was where it coming from and it has  
13 nothing to do with collateral. Mr. Balboa, the emerging market  
14 specialist, knew that.

15           Pari passu, which you saw a little bit about, as the  
16 witnesses told you, absolutely nothing to do with this. The  
17 warrant does not have any collateral. The documents and the  
18 witnesses are clear. Think about this. If there is no  
19 collateral for the warrant and you know there isn't, then  
20 Balboa's inflated prices have no basis in reality, so you know  
21 that the prices he fed to De Charsonville and Pratt who have no  
22 clue what the prices should be, and Balboa knew they had no  
23 clue, especially after they responded so quickly saying I don't  
24 know, I don't have a clue -- these were passed on to GlobeOp.  
25 So you know he did this. Mr. Balboa did this to inflate the

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Rebuttal - Mr. Miller

1 NAV and get higher fees. That shows he is guilty.

2 Let me walk through this \$30 million issue.

3 Defense counsel wants you to believe that in July '08.  
4 Balboa caught a \$30 million error. If he did this, he doesn't  
5 have the guilty mind to inflate the NAV. Remember, NAV can be  
6 inflated. The incentive is the management fees also, not just  
7 the performance fees. This argument has no basis in reality.

8 First, defense witness Ms. Molberg, who testified that  
9 Balboa caught an error, actually admitted on cross-examination  
10 she had no personal knowledge of this and testified based on  
11 what someone reportedly told her.

12 Ms. Gibson-Stark, the compliance officer from  
13 Millennium told you who caught this error. Balboa didn't catch  
14 any error and, also, he admits it in Defense Exhibit A. It was  
15 my error. How else do you know that he didn't catch anything?  
16 He was on vacation. How else do you know Ms. Gibson-Stark was  
17 right when she said that GlobeOp caught the mistake? Also from  
18 DX A itself.

19 Look, at the July 29th email from Dianna Raedle to  
20 Balboa saying investors were wondering why we didn't send out  
21 another estimate that would have given them a warning rather  
22 than just receiving a statement with such a large change.  
23 Investors were wondering why the final statement with the final  
24 NAV that GlobeOp put together showed things were not doing well  
25 because Balboa's estimates painted a different picture. Take a

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Rebuttal - Mr. Miller

1 look at Ms. Gibson-Stark's response. The response is, we need  
2 to discuss a coordinated response to investors. Balboa didn't  
3 catch anything, GlobeOp did. You know there was no good faith  
4 here.

5 What did Balboa do in response to this \$30 million hit  
6 for the June 2008 statement? He jacked up the prices of the  
7 Nigerian warrant twice for July 2008 by over \$1,000 he is  
8 feeding it to De Charsonville to cover the loss in August 5,  
9 2008. Preliminary projections show that the fund is doing  
10 badly, minus 4.5 percent. What does Balboa do the next day?  
11 Gilles, do it very wide, 2650 by 3680. And that is not enough.  
12 On August 12 he emails GlobeOp to ask them to query BCP, again.  
13 Then what happens, jacks up the price. He lessens the blow to  
14 the funds bleeding for July '08. You can see that from  
15 Government Exhibit 6007

16 Ladies and gentlemen, not only does Balboa's action on  
17 this \$30 million ruble issue tell you that he is acting in bad  
18 faith, it is another demonstrable piece of evidence from  
19 Balboa's own words on paper that he is engaged in fraud to  
20 inflate the fund's performance.

21 You know with respect to this Nigerian warrant  
22 liquidity issue that people who testified on the stand that it  
23 was not highly illiquid that it was somewhat illiquid. But  
24 putting that all aside, you got the trades. He knew what this  
25 was trading at and it was all within a very narrow band

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Rebuttal - Mr. Miller

1 width -- the 200 range not 3, 4,000 dollars.

2 The whole idea that GlobeOp being asleep at the switch  
3 somehow mitigates Mr. Balboa's guilt is also a red herring.  
4 They may have been asleep at the switch, doesn't mean that Mr.  
5 Balboa committed the fraud. On the contrary it shows how  
6 easily he was able to commit this fraud. You also heard  
7 Mr. Greaves tell you during GlobeOps there was a separation of  
8 functions and they didn't basically integrate everything until  
9 much later.

10 Finally, on this thin line with respect to De  
11 Charsonville, Mr. Tacopina didn't show you this quote. This is  
12 actually what Mr. De Charsonville said and that is, there is no  
13 thin line with respect to the Nigerian warrant. This case does  
14 not come down to verbiage and contract interpretations. This  
15 comes down to guys who didn't know anything about the price and  
16 Mr. Balboa using them to inflate the NAV.

17 On this directors and delegate issue, you have seen  
18 Government Exhibit 1A -- there are two or three different  
19 places. Not only is he not a director, he is not a delegate  
20 either. You saw that from the fact that a delegate to GlobeOp,  
21 indeed not on just that page, that was 30-some-odd pages later  
22 but it talks about the fact the directors or their delegate  
23 will seek to obtain a quotation from at least two independent  
24 investment banks. Who was doing that? GlobeOp was getting the  
25 counterparties. You can assess Mr. De Charsonville's

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Rebuttal - Mr. Miller

1 credibility for yourself on this delegate issue. Bottom line,  
2 manager marks weren't even supposed to be used, so what are we  
3 even talking about here?

4 And that oversight issue, obviously, Mr. Cowley  
5 explained to you. Of course he was able to have objections and  
6 raise concerns. He can't direct people from behind the scenes  
7 and tell all of the investors, it is independently valued.

8 On the model issue, you have no proof in the record  
9 that Mr. Balboa had any kind of model on the Nigerian warrant  
10 but, more importantly, you have evidence and testimony, I  
11 believe from Mr. Knapp, that this wouldn't be higher on the top  
12 end because the thing was capped, the Nigerian warrant.

13 On Manuel and Goddard, to clear up some things,  
14 Mr. Goddard didn't know that Mr. Pratt was just passing on  
15 Balboa's prices. Pratt told you that. Manuel was not contrary  
16 to what Mr. Tacopina was saying, the records shows you he was  
17 not an emerging market specialist. He was not a Nigerian  
18 warrant expert. In fact you heard testimony to the contrary,  
19 he was just a junior trader who had no clue about the prices of  
20 the Nigerian warrant. In fact, Mr. De Charsonville was giving  
21 prices to Manuel to feed on to GlobeOp doesn't mean that Manuel  
22 knew there was any kind of conspiratorial agreement. Mr.  
23 Cowley walked you through on the subject, you saw all the firm  
24 offers. Bloomberg and ALL-Q, again, shows clear as day and  
25 Mr. Cowley showed you through that, that it says unsecured, no

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Rebuttal - Mr. Miller

1 collateral, yes; secured, no.

2 Finally, incentives and compensation. You have heard  
3 a lot about this. The fund was actually on the uptick, August  
4 2008. You saw that from the newsletters. But Mr. Balboa got a  
5 performance fee in early 2008. That's his incentive. And not  
6 even just the performance fee, he gets a management fee that is  
7 based not on profits, based on NAV which is a larger number to  
8 begin with. His incentive is clear. By the way, even if he  
9 didn't get one dime from his fraud, much less the \$8 million  
10 that he got in 2008, He didn't get one dime, he is still guilty  
11 of the crime; just because you are not successful at a crime,  
12 doesn't mean that you have not committed one.

13 This gross versus NAV thing is also a red herring.  
14 You saw that the NAV is important. Every person on the stand  
15 here told NAV is how you gauge performance, even  
16 Mr. Charlesworth said that. Performance is what investors look  
17 at when they are investing money and that's the percentage that  
18 Mr. Balboa's fees were based on.

19 Finally, ladies and gentlemen, you know Mr. Tacopina's  
20 story doesn't make any sense and you know the government has  
21 proven beyond a reasonable doubt because of the defendant's own  
22 words here, the insiders' response to Mr. Balboa's commands, so  
23 Mr. Balboa knew that they had no idea, no clue what the prices  
24 were. Mr. Pratt quit. He quit the conspiracy and that was, of  
25 course, of course after he had a lot of pressure put on him to

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Rebuttal - Mr. Miller

1 sign that false audit paperwork.

2 Mr. Balboa is the expert. You have heard that time  
3 and time again. He knows these prices are vastly inflated.

4 Fifth point, there were no additional sales and  
5 purchases by Mr. Balboa after those initial ones come March  
6 '07. If he actually believes what Mr. Cowley showed you, that  
7 those prices were actually that high, he would have brought at  
8 200-some odd dollars.

9 Joe Strubel, he didn't buy -- Joe Strubel ran a  
10 completely different fund. That's in the record. You know  
11 that. It was not as if he is micro-managing Mr. Balboa on a  
12 completely different fund.

13 Sixth point, the cover-up, which I have discussed.  
14 That is clear. Ultimately, ladies and gentlemen of the jury.  
15 When all is said and done you know the defendant is guilty  
16 because the recordings don't lie. The cooperator's testimony  
17 is all corroborated. And indeed, while we have proven to you  
18 conspiracy existed beyond a reasonable doubt, the existence of  
19 one is not even necessary for the substantive charges of  
20 securities fraud, wire fraud and investment advisor fraud. It  
21 was shown that Balboa used DeCharsonville and Pratt as his  
22 mouthpieces.

23 Third, the email and documents which are clear as day  
24 and show Manager marks are not used hear. The fund is  
25 independently valued. That's what investors were told but that

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Rebuttal - Mr. Miller

1 is not what happened here.

2 THE COURT: Mr. Miller, you have to bring it to a  
3 close.

4 MR. MILLER: I am.

5 Finally, the cover-up. So what did the defendant do?  
6 He conspired or agreed with others to commit securities fraud  
7 and wire fraud, and the defendant in fact committed securities  
8 fraud, wire fraud and investment advisor fraud. You know this  
9 from all the evidence. You have the whole picture of what  
10 happened in this case from beginning to end.

11 Ladies and gentlemen of the jury, don't let the  
12 defense counsel fool you. Use your common sense. And if you  
13 do, we submit the defendant's guilt has been proven to you  
14 beyond a reasonable doubt by this evidence. And, accordingly,  
15 we ask that you return a verdict of guilty as to all the counts  
16 of the indictment.

17 Thank you.

18 THE COURT: We will take our luncheon recess. Lunch  
19 is served in the jury room. When you are ready, hopefully  
20 around 2 o'clock, we will resume with the jury charge which  
21 will take about an hour and a half.

22 (Jury not present)

23 THE COURT: When I start my jury charge, my request is  
24 that everyone get in their seats and stay there and not  
25 shuttling back and forth. It is a distraction for the jury.

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Rebuttal - Mr. Miller

1 If you are getting drinks and so forth, get it all in  
2 beforehand. I want you to stay in your seats.

3 Did you have something to say.

4 MR. COWLEY: I talked to defense counsel but I assume  
5 they would agree to an instruction about prior proceedings.  
6 Since we proposed.

7 THE COURT: Did you see it, Mr. Tacopina?

8 It is relatively innocuous.

9 MR. TACOPINA: Yes, your Honor.

10 MR. DUBIN: Is it your Honor's intention to release  
11 the two alternates after the charge?

12 THE COURT: Not this charge. Excuse them? They may  
13 be called back later on. Is that what you are asking?

14 MR. DUBIN: My next question, if you discharge them --

15 THE COURT: I think it is in the jury charge I  
16 circulated. You notice I say "excuse" you, not "dismiss,"  
17 because that's what I say in jury charge because there may be  
18 circumstances under which they would be called back.

19 MR. TACOPINA: On this issue of the prior proceedings  
20 language, I just don't want it to appear that -- for instance,  
21 it almost appears that they are not to consider anything about  
22 the prior proceedings, meaning that there was impeachment from  
23 prior testimony. Maybe it doesn't read that way to you or I.

24 THE COURT: You know, Mr. Tacopina. We all slipped.  
25 I don't know if you slip.

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Rebuttal - Mr. Miller

1 MR. TACOPINA: I guess I did. No. I guess I this  
2 trial. This trial.

3 THE COURT: I think this is neutral. If you want to  
4 suggest other language, let me know.

5 MR. TACOPINA: It is fine.

6 MR. DUBIN: We talked about this last night when we  
7 got this. The only concern that we have, your Honor, is that,  
8 as the Court knows, there were various instances where we were  
9 impeaching with the transcripts of the prior proceedings. And  
10 I just doesn't want there to be somehow a juror singled out  
11 saying, well that's our concern.

12 Let us think about it over lunch. I will take your  
13 suggestions.

14 (Luncheon recess)

15 (Continued on next page)

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## A F T E R N O O N   S E S S I O N

2:10 p.m.

(In open court, jury not present)

THE COURT: Anything else?

MR. COWLEY: We deliberated about the prior proceedings instruction. In terms of the draft that you have, the parties are in agreement that if you take out the third sentence, "they are of no concern to your deliberations during the trial," just delete this sentence. And everyone is OK with that.

One other nit that the parties --

THE COURT: Hold on. There is another spot in this charge that responds to Mr. Dubin about prior inconsistent statements. So I strike out "they are of no concern in your deliberations during this trial."

MR. COWLEY: Correct.

And the other nit that the parties agree to be changed is on page 30.

THE COURT: Yes.

MR. COWLEY: There is a reference to the word "stock." It is the sentence that starts in the second full paragraph, "The fraudulent conduct involved the purchase or sale of stock." If you could say the "purchase or sale of securities" instead of stock.

THE COURT: OK.

DCHUBAL5b

1 MR. COWLEY: That is it on consent. I understand that  
2 they may have another issue to raise.

3 THE COURT: Just a minute.

4 (Pause)

5 THE COURT: Mr. Seigel.

6 MR. SEIGEL: As the Court is aware, there is only one  
7 particular security that the government claims was overvalued,  
8 but on page 18, the second paragraph, second line, the  
9 statement is that, "that is, Mr. Balboa had an understanding  
10 with others to deceive investors, fund investors and company  
11 and government investigators about the process used to value  
12 certain assets in Mr. Balboa's investment portfolio and/or the  
13 value of those assets."

14 The concern here is that by reference to "assets" in  
15 the plural, it may cause the jury to think that there were  
16 other securities besides the warrants. So my suggestion would  
17 be that we change "certain assets" to a "particular security."

18 MR. COWLEY: We disagree. The representations that  
19 were made was as to how "assets," plural were valued. I think  
20 they even tried to elicit from Mr. Charlesworth, for example,  
21 that there was some type of exception that applied for illiquid  
22 assets across the board. For those reasons we think  
23 pluralizing it is appropriate.

24 THE COURT: I think that I am going to leave it the  
25 way it is.

DCHUBAL5b

1 MR. SEIGEL: Just for the record, it refers to two  
2 types of deceptions. One is the process used to value certain  
3 assets. I think that is what Mr. Cowley is speaking to,  
4 however --

5 THE COURT: I think it is very clear to this jury  
6 based upon the summations, the only one we are concerned about,  
7 Nigerian assets.

8 Call in the jury, Marlon.

9 MR. TACOPINA: How long are we staying today?

10 THE COURT: As long as the jury wants. I will ask  
11 them to let us know. I don't know what their wishes are. A  
12 lot of them live upstate and it is snowing and they may want to  
13 get home early. I have no idea.

14  
15 (Continued on next page)

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Charge

1 (Jury present)

2 THE COURT: Ladies and gentlemen, I told you at the  
3 beginning how important your service is to our country and to  
4 our system of justice. You have been most conscientious in  
5 your attendance, your punctuality, and the complete attention  
6 you have given over the last two weeks and two days.

7 I am going to read these instructions to you now, but  
8 I want you to know that I am going to send the instructions  
9 into the jury room so that you can take notes but you don't  
10 have to. Indeed, you would be better off if you just listen  
11 and get a sense of the entire direction.

12 I don't want you to single out any particular  
13 instruction as alone stating the law, but you should instead  
14 consider my instructions as a whole.

15 We are now approaching the most important part of this  
16 case: Your deliberations. You have heard all of the evidence,  
17 as well as the final arguments of the lawyers for the parties.  
18 Before you retire to deliberate, it is my duty to instruct you  
19 as to the law that will govern your deliberations. As I told  
20 you at the start of this case, and as you agreed, it is your  
21 duty to accept my instructions of law and to apply them to the  
22 facts as you determine them.

23 Regardless of any opinion that you may have as to what  
24 the law may be or ought to be, it is your sworn duty to follow  
25 the law as I give it to you. Also, if any attorney or other

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Charge

1 person has stated a legal principle different from any that I  
2 state to you in my instructions, it is my instructions that you  
3 must follow.

4 Your duty as is to decide the factual issues in the  
5 case and arrive at a verdict. You, the members of the jury,  
6 are the sole and exclusive judges of the facts. You decide the  
7 weight of the evidence; you determine the credibility of the  
8 witnesses; you resolve such conflicts as there may be in the  
9 testimony; and you draw whatever reasonable inferences you  
10 decide to draw from the facts as you determine them.

11 In determining the facts, you must rely upon your own  
12 recollection of the evidence. None of what the lawyers have  
13 said in their opening statements, closing arguments, questions,  
14 or objections is evidence. They are not sworn as witnesses;  
15 they do not testify; they make arguments about what the  
16 conclusions are that you should draw from the evidence or the  
17 lack of evidence. But as I said, that is argumentation, not  
18 evidence. And the same thing applies to me; anything I may  
19 have said is not evidence. I've allowed you to take notes, but  
20 as I said earlier, your notes are not evidence.

21 The evidence before you consists of just two things;  
22 the testimony given by witnesses that was received in evidence  
23 and the exhibits that were in received in evidence, including  
24 the stipulations of the parties.

25 Testimony consists of the answers that were given by

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Charge

1 the witnesses to the questions that were permitted. The  
2 questions themselves are not evidence. It is the answers to  
3 the questions that count. Remember, you may not consider any  
4 answer that I directed you to disregard or that I directed to  
5 be stricken from the record. Also, as I instructed you at the  
6 beginning of the case, and I am sure you complied with my  
7 instruction, anything you may have seen or heard about this  
8 case outside of the courtroom is not evidence and must be  
9 entirely disregarded.

10 It is the duty of the attorney for each party to  
11 object when the other party offers testimony or other evidence  
12 that the attorney believes is not properly admissible. Counsel  
13 also have the right and duty to ask the Court to make rulings  
14 of law and to request conferences out of the hearing of the  
15 jury. All such questions of law have to be decided by me. You  
16 should not allow any prejudice against any attorney or party  
17 because the attorney objected to the admissibility of evidence,  
18 or asked for a conference out of your hearing, or asked me for  
19 a ruling on the law.

20 I am instructing you now that the testimony and the  
21 documents that have been admitted into evidence are appropriate  
22 for your consideration. You may consider all the evidence that  
23 has been admitted.

24 I also ask you to draw no inference from my rulings or  
25 from the fact that upon occasion I asked questions of certain

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Charge

1 witnesses. My rulings were no more than applications of the  
2 law, and my questions were only intended for clarification or  
3 to expedite matters. You are expressly to understand that I  
4 have no opinion as to what your verdict should be or what  
5 verdict you should render in this case.

6 You are perform your duty of finding the facts without  
7 bias or prejudice as to any party. You are to perform your  
8 duty with an attitude of complete fairness and impartiality.  
9 The case is important to both parties. Mr. Balboa is charged  
10 with serious crimes. He has pleaded not guilty. It is  
11 important to the government, too; enforcement of government  
12 laws is a prime concern of the government.

13 The fact that the prosecution brought is brought in  
14 the name of the United States of America entitles the  
15 government to no greater consideration than that accorded to  
16 any other party. By the same token, it is entitled to no less  
17 consideration. All parties, whether the government or  
18 individuals, stand as equals before the Court.

19 It would be improper for you to consider, in reaching  
20 your decision as to whether the government sustained its burden  
21 of proof, any personal feelings you may have about Mr. Balboa's  
22 race, religion national origin, gender, or age. All persons  
23 are entitled to the presumption of innocence and the government  
24 has the burden of proof, as I will discuss in more detail in a  
25 moment. It would be equally improper for you to allow any

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Charge

1 feelings you might have about the nature of the crime charged  
2 to interfere with your decision-making process.

3 You are not to be swayed in any way by sympathy.  
4 Rather, the crucial question that you must ask yourselves as  
5 you review the evidence is: Has the government proved the  
6 guilt of Mr. Balboa beyond a reasonable doubt?

7 It must be clear to you that if you were to let bias,  
8 prejudice, fear, disgust, sympathy, or any other irrelevant  
9 consideration interfere with your thinking, there would be a  
10 risk that you would not arrive at a true and just verdict. So  
11 you are not to be guided by anything but clear thinking and  
12 calm analysis of the evidence. Sympathy should play no role in  
13 your deliberations.

14 You should also not consider any personal feelings you  
15 may have about the attorneys who represented the parties in  
16 this matter. As I indicated at the beginning of the trial, the  
17 lawyers and the other participants at counsel table have been  
18 instructed not to have any communications with you as jurors.  
19 If due to the congestion in the courthouse you ran into counsel  
20 and they ignored you, they did so because they were supposed to  
21 ignore you. That's the rule. This should not influence your  
22 decision regarding Mr. Balboa's guilt or innocence in any way.

23 The question of Mr. Balboa's possible punishment is of  
24 no concern to the jury and should not, in any sense, enter into  
25 or influence your deliberations. The duty of imposing sentence

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Charge

1 rest exclusively with the Court. Your function is to weigh the  
2 evidence, or lack of evidence, in the case and to determine  
3 whether or not Mr. Balboa is guilty beyond a reasonable doubt,  
4 solely on the basis of such evidence.

5 The defendant, Michael Balboa, was formally charged in  
6 an indictment. He is entitled to know the charges against him.  
7 As I instructed you when the trial started, the indictment is  
8 not evidence. It merely describes the accusations made against  
9 the defendant. It may not be considered by you as any evidence  
10 of guilt. You are to give no weight to the fact that an  
11 indictment has been returned against the defendant.

12 I will not read the entire indictment to you at this  
13 time, as sometimes happens. Rather, I will summarize the  
14 offenses charged in the indictment and I will then explain in  
15 detail the elements of the charged offense. Before you begin  
16 your deliberations, you will be provided with a copy of the  
17 indictment.

18 Now, the law presumes Mr. Balboa innocent until proven  
19 guilty beyond a reasonable doubt. Mr. Balboa has entered a  
20 plea of not guilty to the indictment. As a result, the  
21 government has the burden to prove his guilt beyond a  
22 reasonable doubt. This burden never shifts to Mr. Balboa for  
23 the simple reason that the law presumes him innocent and never  
24 imposes upon any defendant in a criminal case the burden or a  
25 duty of calling any witnesses or producing any evidence.

DCHUBAL5b

Charge

1           In other words, Mr. Balboa starts with a clean slate.  
2           He is presumed innocent until such time as you, the jury, are  
3           unanimously satisfied that the government has proved him guilty  
4           beyond a reasonable doubt. If the government fails to sustain  
5           this burden, you must find him not guilty.

6           I have said that the government must prove that  
7           Mr. Balboa is guilty beyond a reasonable doubt. And this  
8           burden never shifts to Mr. Balboa; instead, it is always the  
9           government's burden to prove beyond a reasonable doubt each of  
10          the elements of the crimes charged. Mr. Balboa has no burden  
11          to prove himself innocent.

12          The question then is: What is a reasonable doubt?  
13          Well, the words almost define themselves. It is a doubt based  
14          upon reason. It is a doubt that a reasonable person has after  
15          carefully weighing all the evidence. Proof beyond a reasonable  
16          doubt must, therefore, be proof of such a convincing character  
17          that a reasonable person would not hesitate to rely and act  
18          upon it in the most important of his own matters.

19          A reasonable doubt is not a guess or a whim; it is not  
20          speculation or suspicion. It is not an excuse to avoid the  
21          performance of an unpleasant duty, and it is not sympathy. The  
22          law does not require that the government prove guilt beyond all  
23          possible doubt; proof beyond a reasonable doubt is sufficient  
24          to convict.

25          If, after a fair and impartial consideration of all of

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Charge

1 the evidence, you have a reasonable doubt as to the guilt of  
2 Mr. Balboa, it is your duty to acquit him. On the other hand,  
3 if after a fair and impartial consideration of all the  
4 evidence, you are satisfied that the government has met its  
5 burden of proving Mr. Balboa's guilt beyond a reasonable doubt,  
6 it is your duty to convict.

7 Now, a few words about evidence.

8 In deciding whether Mr. Balboa is guilty or not  
9 guilty, you may consider both direct evidence and  
10 circumstantial evidence.

11 Direct evidence is evidence that proves a disputed  
12 fact directly. For example, where a witness testifies as to  
13 what he or she saw, heard, or observed, this is called direct  
14 evidence.

15 Circumstantial evidence is evidence that tends to  
16 prove a disputed fact by proof of other facts. To give you a  
17 simple example, one that is used all the time in the  
18 courthouse, suppose that when you came into the courthouse  
19 today the sun was shining and it was a nice day, but now the  
20 courtroom blinds are drawn and you cannot look outside. As you  
21 are sitting here, someone walks in with a dripping wet umbrella  
22 and soon thereafter someone walks in with a dripping wet  
23 raincoat. Now, on our assumed facts, you cannot look outside  
24 of the courtroom to see whether it is raining so you have no  
25 direct evidence of that fact.

DCHAABAL6

## Jury Charge

1           THE COURT: An inference is the deduction or  
2 conclusion that reason and common sense prompt a reasonable  
3 mind to draw from facts that have been proven by the evidence.  
4 Not all logically possible conclusions are legitimate or fair  
5 inferences. Only those inferences to which the mind is  
6 reasonably led or directed are fair inferences from direct or  
7 circumstantial evidence in this case. Whether or not to draw a  
8 particular inference is, of course, a matter exclusively for  
9 you to decide, as are all determinations of fact.

10           Many material facts, such as state of mind, are rarely  
11 susceptible of proof by direct evidence. Generally, such facts  
12 are established by circumstantial evidence and the inferences  
13 the jury draws from them. The law makes no distinction between  
14 direct and circumstantial evidence. Circumstantial evidence is  
15 of no less value than direct evidence, and you can consider  
16 either or both, and can give them such weight as you conclude  
17 is warranted.

18           There has been evidence that Mr. Balboa made certain  
19 statements in which the Government claims he made admissions or  
20 denials relevant to the charges in the Indictment. Evidence of  
21 these statements was properly admitted in this case and may be  
22 considered by you. You are to give the statements such weight  
23 as you feel they deserve in light of all of the evidence.  
24 Whether you approve or disapprove of the use of these  
25 statements may not enter your deliberations. I instruct you

DCHAABAL6

Jury Charge

1 that no one's rights were violated, and the Government's use of  
2 this evidence is entirely lawful.

3           You may have heard reference to the fact that certain  
4 investigative techniques were not used by the Government.  
5 There is no legal requirement that the Government prove its  
6 case through any particular means. While you are to carefully  
7 consider the evidence adduced by the Government, you are not to  
8 speculate as to why they used the techniques they did or why  
9 they did not use other techniques. The Government is not on  
10 trial. Law enforcement techniques are not your concern. Your  
11 concern is to determine whether or not, on the evidence or lack  
12 of evidence, Mr. Balboa's guilt has been proved beyond a  
13 reasonable doubt. Certain audio recordings of conversations  
14 have been admitted into evidence. You are not asked to approve  
15 or disapprove of the recording of these conversations. These  
16 recordings were made in a lawful manner, and the evidence was  
17 admitted in this case and may be considered along with all the  
18 other evidence in the case in determining whether the  
19 Government has proved Mr. Balboa's guilt beyond a reasonable  
20 doubt. I instruct you that no one's rights were violated and  
21 that the Government's use of this evidence is entirely lawful.

22  
23           To help your listening, transcripts have also been  
24 prepared. However, the transcripts were not admitted into  
25 evidence. Only the audio recordings themselves are evidence.

DCHAABAL6

## Jury Charge

1 You are not to regard the transcripts as anything more than an  
2 aide. It is what you hear on the recordings that matters.  
3 Nonetheless, if you wish to view the transcripts, they will be  
4 made available to you during your deliberations.

5 Several charts that summarize voluminous records have  
6 been received as evidence, in addition to the underlying  
7 records. The charts and summaries were admitted in order to  
8 save time and avoid unnecessary inconvenience. They are merely  
9 graphic demonstrations of the underlying information, intended  
10 to be of assistance to you in your deliberations. It is up to  
11 you to decide whether these charts fully, fairly, and correctly  
12 present the information in the testimony and the documents on  
13 which they are based. The headings and titles on these charts  
14 are not evidence, however. They are there as a demonstrative  
15 aid. You may consider the charts and summaries as you would  
16 any other evidence, if you feel they are of assistance to you.

17 In this case, you have heard evidence in the form of  
18 several stipulations. A stipulation of testimony is an  
19 agreement among the parties that, if called, a witness would  
20 have given certain testimony. You must accept as true the fact  
21 that the witness would have given the testimony. However, it  
22 is for you to determine the effect to be given that testimony.  
23 You also heard evidence in the form of stipulations of fact,  
24 which are agreements among the parties that a certain fact is  
25 true. You must regard such agreed facts as true.

DCHAABAL6

## Jury Charge

1           It does not matter if a specific transaction is  
2           alleged to have occurred on or about a certain date or that it  
3           involved a specific number of shares or amount of money but the  
4           testimony indicates that in fact it was a different date or  
5           amount. The law only requires a substantial similarity between  
6           the dates and amounts alleged in the Indictment and the dates  
7           and amounts established by the testimony or other evidence.  
8           The same goes for most of the other factual contentions in the  
9           Indictment.

10           It must be clear to you by now that counsel for the  
11           parties are asking you to draw very different conclusions about  
12           the significant factual issues in the case. An important part  
13           of your decision will involve making judgments about the  
14           testimony of the witnesses you have listened to and observed.  
15           In making these judgments, you should carefully scrutinize all  
16           of the testimony of each witness, the circumstances under which  
17           each witness testified, and any other matter in evidence that  
18           may help you to decide the truth and the importance of each  
19           witness's testimony.

20           Your decision whether or not to believe a witness may  
21           depend on how that witness impressed you. Was the witness  
22           candid, frank and forthright; or did the witness seem to be  
23           evasive or suspect in some way? How did the way the witness  
24           testified on direct examination compare with how the witness  
25           testified on cross examination? Was the witness consistent or

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## Jury Charge

1 contradictory? Did the witness appear to know what he or she  
2 was talking about? Did the witness strike you as someone who  
3 was trying to report his knowledge accurately? What was the  
4 witness's demeanor like? These are examples of the kinds of  
5 common sense questions you should ask yourselves in deciding  
6 whether a witness is or is not truthful.

7 In addition, you may consider whether a witness had  
8 any possible bias or relationship with a party, or any possible  
9 interest in the outcome of the case. Such a bias,  
10 relationship, or interest does not necessarily make the witness  
11 unworthy of belief. These are simply factors that you may  
12 consider.

13 Similarly, if you determine that a witness made  
14 statements in the past that are inconsistent with his testimony  
15 during the trial concerning facts that are at issue here, you  
16 may consider that fact in deciding how much of the testimony,  
17 if any, to believe. In making this determination, you may  
18 consider whether the witness purposefully made a false  
19 statement, or whether it was an innocent mistake. You may also  
20 consider whether the inconsistency concerns an important fact  
21 or merely a small detail, as well as whether the witness had an  
22 explanation for the inconsistency that appealed to your common  
23 sense.

24 If you find that a witness has testified falsely as to  
25 any material fact, or if you find that a witness has been

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## Jury Charge

1 previously untruthful when testifying under oath, you may  
2 reject that witness's testimony in its entirety, or you may  
3 accept those parts that you believe to be truthful or that are  
4 corroborated by other independent evidence in the case.

5 You should also consider whether the witness had an  
6 opportunity to observe the facts he or she testified about, and  
7 whether the witness's recollection of the facts stands up in  
8 light of the other evidence in the case.

9 In other words, what you must try to do in deciding  
10 credibility is to size up a person just as you would in any  
11 important matter where you are trying to decide if a person is  
12 truthful, straightforward and accurate in his recollection.

13 Now, a witness may be discredited or impeached by  
14 contradictory evidence, or by evidence that at some other time  
15 the witness has said or done something that is inconsistent  
16 with the witness's present testimony. The earlier inconsistent  
17 or contradictory statements are admissible only to discredit or  
18 impeach the credibility of the witness, not to establish the  
19 truth of the earlier statements made somewhere else other than  
20 here in front of you during this trial. It is the role of the  
21 jury to determine the credibility of a witness who had made  
22 prior inconsistent or contradictory statements. If you believe  
23 that any witness has been impeached and thus discredited, then  
24 it is for you to give the testimony of that witness as much or  
25 as little weight, if any, as you think it deserves.

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## Jury Charge

1           It is for you, the jury, and for you alone, not the  
2 lawyers, or the witnesses, or me as the Judge, to decide the  
3 credibility of witnesses who appeared here and the weight that  
4 their testimony deserves. After making your own judgment or  
5 assessment concerning the credibility of a witness, you can  
6 then attach such importance or weight to their testimony, if  
7 any, that you feel it deserves. You will then be in a position  
8 to decide whether the Government has proven the charges beyond  
9 a reasonable doubt.

10           You have heard evidence during the trial that  
11 witnesses have discussed the facts of the case and their  
12 testimony with the lawyers before the witnesses appeared in  
13 court. Although you may consider that fact when evaluating a  
14 witness's credibility, it is neither unusual nor inappropriate  
15 for a witness to meet with lawyers before testifying so that  
16 the witness can be aware of the subjects he or she will be  
17 questioned about, focus on those subjects and have the  
18 opportunity to review relevant exhibits and prior testimony  
19 before being questioned about them. It is your decision what  
20 inferences to draw from a witness's preparation for his  
21 testimony.

22           You have heard testimony from three Government  
23 witnesses, Mr. DeCharsonville, Mr. Pratt and Mr. Nesti, who  
24 testified pursuant to immunity and non-prosecution agreements  
25 with the Government. The Government is permitted to make these

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## Jury Charge

1 kinds of promises and is entitled to call as witnesses people  
2 to whom such promises are given. The fact that the Government  
3 has agreed not to prosecute a witness does not disqualify that  
4 witness from testifying and does not preclude you from  
5 accepting that testimony as true.

6 The law allows the use of such testimony and it is  
7 properly considered by the jury. The testimony of a  
8 cooperating witness may be enough in itself to support a  
9 conviction if the jury finds that the testimony established  
10 guilt beyond a reasonable doubt. It is also the case that  
11 cooperating witness testimony must be scrutinized with great  
12 care and viewed with special caution. In evaluating the  
13 testimony of a witness who has a non-prosecution agreement or  
14 immunity agreement, you should ask yourselves whether he would  
15 benefit more by lying or by telling the truth. Was the  
16 testimony made up in anyway because the witness believed or  
17 hoped that he would somehow receive favorable treatment by  
18 testifying falsely, or did the witness believe that his  
19 interest would best be served by testifying truthfully?

20 If you believe that the witness was motivated by hopes  
21 of personal gain, was the motivation one that would cause the  
22 witness to lie, or was it one that would cause him to tell the  
23 truth? Did this motivation color the witness' testimony? If  
24 you find that the testimony was false, you should reject it.  
25 However, if, after a careful examination of the witness'

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Jury Charge

1 testimony and demeanor you are satisfied that he told the  
2 truth, you should accept it as credible and act upon it  
3 accordingly. Whether one of these witnesses may have been  
4 guilty of a criminal offense is not evidence of the guilt of  
5 anyone else, including Mr. Balboa.

6 One final note in this regard, it is of no concern of  
7 yours why the Government made agreements with these three  
8 witnesses. Your sole concern is to decide whether the  
9 witnesses have given truthful testimony in this case before  
10 you.

11 The issue of credibility need not be decided in an all  
12 or nothing fashion. Credibility is a determination entirely  
13 for you, the jury. A cooperating witness' testimony should be  
14 given such weight as it deserves in light of all the facts and  
15 circumstances, as you would the testimony of any other witness.

16 You may not draw any inference, favorable or  
17 unfavorable, towards the Government or Mr. Balboa from the fact  
18 that any person or persons other than Mr. Balboa are not on  
19 trial here. You also may not speculate as to the reasons why  
20 other persons are not on trial. Those matters are wholly  
21 outside your concern and have no bearing on your function as  
22 jurors.

23 You have also heard reference throughout this trial to  
24 prior proceedings. You should not speculate as to the nature  
25 of these prior proceedings. You are accordingly instructed not

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Jury Charge

1 to draw any inference of the fact there was any prior  
2 proceeding in this matter.

3           You have heard testimony of Matthew Howard, an  
4 employee of FINRA, the Financial Industry Regulatory Authority.  
5 The fact that a witness may be employed as a regulatory  
6 official does not mean that his testimony deserves more or less  
7 consideration or greater or lesser weight than that of any  
8 other witness. In this context, defense counsel is allowed to  
9 try to attack the credibility of such a witness on the ground  
10 that his testimony may be affected by a personal or  
11 professional interest in the outcome of the case. It is your  
12 decision, after reviewing all the evidence, whether or not to  
13 accept the testimony of Mr. Howard and to give that testimony  
14 whatever weight, if any, you find it deserves.

15           You have to decide this case based on the evidence  
16 that is before you. There may be people whose names you have  
17 heard during the course of the trial who did not appear to  
18 testify. The trial has lasted two weeks and two days, but even  
19 in a trial this long, there is invariably a selection of  
20 witnesses. Trials cannot last forever, and you cannot put  
21 everyone on the stand. I instruct you that both the Government  
22 and Mr. Balboa have the ability to subpoena witnesses. Each  
23 party had an equal opportunity or lack of opportunity to call  
24 any of these witnesses. Therefore, you should not draw any  
25 inferences or reach any conclusion as to what they would have

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## Jury Charge

1 testified to had they been called. Their absence should not  
2 affect your judgment in anyway.

3 You should remember my instruction, however, that the  
4 law does not impose on the defendant in a criminal case the  
5 burden or duty of calling any witness or producing any  
6 evidence.

7 The Defendant, Michael Balboa, did not testify in this  
8 case. Under our Constitution, a defendant has no obligation to  
9 testify or to present any evidence, because it is the  
10 Government's burden to prove guilt beyond a reasonable doubt.  
11 That burden remains with the Government throughout the entire  
12 trial and never shifts to the Defendant. A defendant is never  
13 required to prove that he or she is innocent.

14 You must not attach any significance to the fact that Mr.  
15 Balboa did not testify. No adverse inference against him may  
16 be drawn by you because he did not take the witness stand. You  
17 may not consider this against Mr. Balboa in any way in your  
18 deliberations in the jury room.

19 The Indictment contains five counts or "charges."  
20 Count One of the Indictment charges the defendant with  
21 securities fraud conspiracy. Specifically, it charges that,  
22 from in or about January 2008 through in or about March 2011,  
23 Michael Balboa conspired or agreed with others to commit  
24 securities fraud by misleading investors and potential  
25 investors about the process used to value certain assets in his

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1 investment portfolio and/or the true value of those assets, and  
2 by concealing his fraudulent scheme from various company and  
3 government investigators.

4 Count Two charges Mr. Balboa with wire fraud  
5 conspiracy from in or about January 2008 through in or about  
6 March 2011, based on the same allegations as in Count One.

7 Both Counts One and Two are conspiracy counts. As I  
8 will explain in more detail shortly, a conspiracy is a criminal  
9 agreement to violate United States law. The other charges in  
10 the indictment allege what are called "substantive" violations.  
11 Unlike a conspiracy charge, which is a charge of agreeing to  
12 commit a criminal offense, the substantive counts allege the  
13 actual commission of criminal offenses.

14 Specifically, Count Three charges Mr. Balboa with a  
15 substantive count of securities fraud. Count Four charges a  
16 substantive count of wire fraud. Finally, Count Five charges a  
17 substantive count of investment adviser fraud.

18 This summarizes the five counts or charges in the  
19 Indictment. You must consider each count separately, and you  
20 must return a separate verdict of guilty or not guilty for each  
21 count separately. Whether you find Mr. Balboa guilty or not  
22 guilty as to one count should not affect your verdict as to any  
23 other count.

24 With that summary as background, I will now turn to  
25 the detailed instructions that concern the conspiracy charged

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1 in Count One.

2 Count One of the Indictment charges Mr. Balboa with  
3 participating in a securities fraud conspiracy, in violation of  
4 Section 371 of Title 18 of the United States Code, which  
5 provides:

6 "If two or more persons conspire either to commit any offense  
7 against the United States, or to defraud the United States, or  
8 any agency thereof in any manner or for any purpose, and one or  
9 more of such persons do any act to effect the object of the  
10 conspiracy, each" is guilty of a crime.

11 Mr. Balboa is charged in Count One with participating  
12 in a conspiracy to violate the securities laws of the United  
13 States. That is, Mr. Balboa had an understanding with others to  
14 deceive investors, potential investors, and company and  
15 government investigators about the process used to value  
16 certain assets in Mr. Balboa's investment portfolio and/or the  
17 value of those assets. The Indictment also lists various overt  
18 acts that are alleged to have been committed in furtherance of  
19 the conspiracy.

20 What is a conspiracy? A conspiracy is a kind of  
21 criminal partnership -- a combination or agreement of two or  
22 more persons to join together to accomplish some unlawful  
23 purpose. The essence of the crime is an agreement or  
24 understanding to violate other laws. The crime of conspiracy  
25 to violate a federal law is a separate offense from the

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1 commission of the underlying crime itself. If a conspiracy  
2 exists, even if it should fail in its purpose or the underlying  
3 crime is not actually committed, the conspiracy is still  
4 punishable as a crime.

5 To sustain its burden of proof with respect to the  
6 allegation of conspiracy, the Government must prove the  
7 following three elements beyond a reasonable doubt:

8 First, the existence of the conspiracy charged in the  
9 Indictment; that is, an agreement or understanding to violate  
10 the securities laws of the United States, the object of the  
11 crime charged in Count One. The first question is: Did the  
12 conspiracy exist?

13 Second, that Mr. Balboa knowingly and willfully became  
14 a member of the conspiracy. The second question is: Did Mr.  
15 Balboa knowingly, and willfully associate with and participate  
16 in the conspiracy?

17 Third, that any one of the conspirators -- not  
18 necessarily Mr. Balboa, but any one of the parties involved in  
19 the conspiracy -- knowingly committed at least one overt act in  
20 furtherance of the conspiracy during the life of the  
21 conspiracy.

22 Now let us separately consider each of the three  
23 elements:

24 First, the existence of the conspiracy; second,  
25 whether Mr. Balboa knowingly associated himself with and

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1 participated in the conspiracy; and third, whether an overt act  
2 was committed in furtherance of the conspiracy.

3 Starting with the first element, what is a conspiracy?  
4 Simply defined, a conspiracy is an agreement or an  
5 understanding of two or more persons to accomplish by joint  
6 action a criminal or unlawful purpose. The conspiracy alleged  
7 here is an agreement to commit the crime of securities fraud.  
8 It is an entirely distinct and separate offense from the actual  
9 commission of the crime of securities fraud, and the Government  
10 does not have to prove the actual commission of securities  
11 fraud for you find Mr. Balboa guilty of conspiracy.

12 To establish a conspiracy, the Government does not  
13 have to show that individuals sat around a table and entered  
14 into a solemn pact, orally or in writing, stating that they  
15 have formed a conspiracy to violate the law, and setting forth  
16 details of the plans and the means by which the unlawful  
17 project is to be carried out or the part to be played by each  
18 conspirator. Indeed, it is rare that a conspiracy can be  
19 proved by direct evidence of an explicit agreement.  
20 Common sense tells you that when people in fact undertake to  
21 enter into a criminal conspiracy, much is left to unexpressed  
22 understanding. From its very nature, a conspiracy is almost  
23 invariably secret in its origin and execution.

24 To show that a conspiracy existed, then, it is  
25 sufficient if the evidence shows that two or more persons in

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1 some way or manner, explicitly or implicitly, came to an  
2 understanding to violate the law and to establish an unlawful  
3 plan.

4 In determining whether there has been an unlawful  
5 agreement, you may consider the acts and conduct of the alleged  
6 co-conspirators which were done to carry out the apparent  
7 criminal purpose. The adage "actions speak louder than words"  
8 may be applicable here. At times, the only evidence available  
9 with respect to the existence of a conspiracy is that of  
10 disconnected acts on the part of the alleged individual  
11 co-conspirators. When taken together and considered as a  
12 whole, however, such acts may show a conspiracy or agreement as  
13 conclusively as would direct proof.

14 So, in considering the first element of the crime of  
15 conspiracy as charged, whether the conspiracy actually existed,  
16 you should consider all the evidence which has been admitted  
17 with respect to the acts, conduct and declarations of the  
18 alleged conspirators, and the reasonable inferences to be drawn  
19 from such evidence. It is sufficient to establish the  
20 existence of the conspiracy if, after considering all of the  
21 relevant evidence, you find beyond a reasonable doubt that the  
22 minds of at least two alleged conspirators met in an  
23 understanding way, and that they agreed, as I have explained,  
24 to work together in furtherance of the unlawful scheme alleged  
25 in the Indictment.

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1           As I mentioned, the Indictment here charges that the  
2           object of the conspiracy was to commit securities fraud.  
3           Specifically, Mr. Balboa is alleged to have conspired to commit  
4           securities fraud by agreeing with others to defraud investors  
5           and potential investors in his hedge fund by (1) employing  
6           devices, schemes, or artifices to defraud, or (2) making untrue  
7           statements of material fact or omitting to state material facts  
8           necessary to make other statements not misleading; or (3)  
9           engaging in acts and practices and courses of business that  
10          operated as a fraud and deceit. Through these means, it is  
11          alleged that Mr. Balboa and others would and did conceal from  
12          investors, potential investors, and various investigators the  
13          procedure used to value certain assets in Mr. Balboa's  
14          investment portfolio and/or the true value of those assets.  
15          The securities laws, the violation of which is alleged to have  
16          been the object of the criminal conspiracy, are set forth in  
17          Title 15 of the United States Code and Title 17 of the Code of  
18          Federal Regulations. I will provide more detailed instructions  
19          on the laws of securities fraud when I instruct you on Count  
20          Three.

21               If you conclude that the Government has proven beyond  
22               a reasonable doubt that the conspiracy charged in Count One  
23               existed and its object was securities fraud, you should proceed  
24               to consider the second element: did Mr. Balboa participate in  
25               the conspiracy with knowledge of its unlawful purpose or

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1 purposes, and in furtherance of its unlawful objective or  
2 objectives.

3 The Government must prove beyond a reasonable doubt  
4 that Mr. Balboa knowingly and willfully entered into the  
5 conspiracy, the agreement, with a criminal intent, that is,  
6 with a purpose to violate the law, and agreed to take part in  
7 the conspiracy to further promote and cooperate in its unlawful  
8 objectives.

9 As to this element, the terms "knowingly" and  
10 "willfully" mean that you must be satisfied beyond a reasonable  
11 doubt that in joining the conspiracy, Mr. Balboa knew what he  
12 was doing -- that he took the actions in question deliberately  
13 and voluntarily, with the intent to do something that the law  
14 forbids. That is, Mr. Balboa's acts must have been the product  
15 of his conscious objective and not the product of a mistake,  
16 accident, negligence, or some other innocent reason.

17 "Unlawfully" simply means contrary to law. Mr. Balboa need not  
18 have known that he was breaking any particular law or any  
19 particular rule. He need only have been aware of the generally  
20 unlawful nature of the acts he undertook.

21 How do we know what another person knows? Knowledge  
22 is a matter of inference from the proven facts. We cannot look  
23 into a person's mind to know what someone is thinking.  
24 Instead, you have before you evidence of certain acts and  
25 conversations alleged to have taken place with Mr. Balboa or in

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1 his presence. It is for you to determine whether the  
2 Government has established beyond a reasonable doubt that these  
3 acts and conversations show such knowledge and intent on the  
4 part of Mr. Balboa.

5 It is not necessary that Mr. Balboa was fully informed  
6 as to all the details of the conspiracy in order to justify an  
7 inference of knowledge on his part. To have guilty knowledge,  
8 Mr. Balboa need not have known the full extent of the  
9 conspiracy or all of its activities or all of its participants.  
10 It is not even necessary that Mr. Balboa know every other  
11 member of the conspiracy. In fact, a defendant may know only  
12 one other member of the conspiracy and still be a  
13 co-conspirator.

14 The duration and extent of a defendant's participation  
15 in the conspiracy has no bearing on the issue of a defendant's  
16 guilt. A defendant need not have joined the conspiracy at the  
17 outset. A defendant may have joined it for any purpose at any  
18 time during its progress, and that defendant will still be held  
19 responsible for all that was done before he or she joined and  
20 all that was done during the conspiracy's existence while the  
21 defendant was a member. Each member of a conspiracy may  
22 perform separate and distinct acts and may perform them at  
23 different times. Some conspirators play major roles, while  
24 others play minor roles in the scheme. An equal role is not  
25 what the law requires. In fact, even a single act may be

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1 sufficient to draw a defendant within the ambit of a  
2 conspiracy.

3 I want to caution you, however, that the mere  
4 association by one person with another does not make that  
5 person a member of the conspiracy, even when coupled with  
6 knowledge that a conspiracy is taking place. A person may  
7 know, or be friendly with, a criminal, without being a criminal  
8 himself. Mere similarity of conduct or the fact that they may  
9 have assembled together and discussed common aims and interests  
10 does not necessarily establish membership in the conspiracy.  
11 Mere presence at the scene of a crime, even coupled with  
12 knowledge that a crime is taking place, is not sufficient to  
13 support a conviction. In other words, knowledge without  
14 participation is not sufficient. Conversely, the fact that  
15 the acts of a defendant, without knowledge of the conspiracy  
16 and its unlawful objectives, merely happen to further the  
17 purpose or objectives of the conspiracy does not make him a  
18 member of the conspiracy. What is necessary is that Mr. Balboa  
19 has participated in the conspiracy with knowledge of its  
20 unlawful purpose and with an intent to aid in the  
21 accomplishment of its unlawful objective.

22 Since an essential element of the crime charged is  
23 knowledge and willfulness it follows that good faith on the  
24 part of Mr. Balboa is a complete defense to a charge of  
25 conspiracy. As I will instruct you, Mr. Balboa, however, has

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1 no burden to establish a defense of good faith. The burden is  
2 on the Government to prove fraudulent intent and Mr. Balboa's  
3 consequent lack of good faith beyond a reasonable doubt. I  
4 will give you further instruction on the defense of good faith  
5 later in my instructions.

6 In sum, Mr. Balboa, with an understanding of the  
7 unlawful character of the conspiracy, must have intentionally  
8 engaged, advised or assisted in the conspiracy for the purpose  
9 of furthering an illegal undertaking. Mr. Balboa thereby  
10 becomes a knowing and willing participant in the unlawful  
11 agreement -- that is to say, a conspirator.

12 A conspiracy, once formed, is presumed to continue  
13 until either its objectives are accomplished or there is some  
14 affirmative act of termination by its members. So, too, once a  
15 person is found to be a member of a conspiracy, he or she is  
16 presumed to continue his membership in the venture until its  
17 termination, unless it is shown by some affirmative proof that  
18 he or she withdrew and disassociated himself or herself from  
19 it.

20 The first element of Count One requires that Mr.  
21 Balboa had an agreement, and the second element requires that  
22 Mr. Balboa knowingly participated. The third element of the  
23 conspiracy charge is the requirement of an overt act. To  
24 sustain its burden of proof, the Government must show beyond a  
25 reasonable doubt that at least one overt act was committed in

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1 furtherance of the conspiracy by at least one of the  
2 co-conspirators-but not necessarily Mr. Balboa.

3 The purpose of the overt act requirement is that there  
4 must have been something more than mere agreement; some overt  
5 step or action must have been taken by at least one of the  
6 conspirators in furtherance of the conspiracy.

7 The Indictment sets forth numerous overt acts the  
8 Government alleges were made by the conspirators in furtherance  
9 of the conspiracy. They are listed in the Indictment,  
10 Paragraphs 28(a)-(m) on pages 10-12. In order for the  
11 Government to satisfy the overt act requirement, it is not  
12 necessary for the Government to prove all of the overt acts  
13 alleged in the Indictment or even any of the overt acts  
14 contained in the Indictment. Indeed, you may find that overt  
15 acts were committed which were not alleged in the Indictment.  
16 In short, it is sufficient for the Government to show that Mr.  
17 Balboa or one of his alleged co-conspirators knowingly and  
18 willfully committed any overt act in furtherance of the  
19 conspiracy during the life of the conspiracy. You are further  
20 instructed that the overt act need not have been committed at  
21 precisely the time alleged in the Indictment; it is sufficient  
22 if you are convinced beyond a reasonable that that an overt act  
23 occurred while the conspiracy was in existence. But you must  
24 be unanimous on what the overt act is.

25 You should bear in mind that the overt act, standing

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1 alone, may be an innocent, lawful act. At times, however, an  
2 apparently innocent act sheds its harmless character if it is a  
3 step in carrying out or promoting the conspiratorial scheme.  
4 You are therefore instructed that the overt act does not have  
5 to be an act which in and of itself is criminal or constitutes  
6 an objective of the conspiracy.

7 I admitted into evidence against Mr. Balboa the acts  
8 and statements of others because these acts and statements were  
9 committed by persons who, the Government charges, were Mr.  
10 Balboa's co-conspirators.

11 I allowed this evidence to be received against Mr.  
12 Balboa because of the nature of the crime of conspiracy. A  
13 conspiracy is often referred to as a partnership in crime.  
14 Thus, as in other types of partnerships, when people enter into  
15 a conspiracy to accomplish an unlawful end, each and every  
16 member becomes an agent for the other conspirators in carrying  
17 out the conspiracy.

18 Accordingly, the reasonably foreseeable acts,  
19 declarations, statements and omissions of any member of the  
20 conspiracy and in furtherance of the common purpose of the  
21 conspiracy, are deemed, under the law, to be the acts of all of  
22 the members, and all of the members are responsible for such  
23 acts, declarations, statements and omissions.

24 If you find, beyond a reasonable doubt, that Mr.  
25 Balboa was a member of the conspiracy charged in the

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1 Indictment, then, any acts done or statements made in  
2 furtherance of the conspiracy by persons also found by you to  
3 have been members of that conspiracy, may be considered against  
4 him. This is so even if such acts were done and statements  
5 were made in Mr. Balboa's absence and without his knowledge.

6 However, before you may consider the statements or  
7 acts of a co-conspirator in deciding the issue of Mr. Balboa's  
8 guilt, you must first determine that the acts and statements  
9 were made during the existence, and in furtherance, of the  
10 unlawful scheme. If the acts were done or the statements made  
11 by someone whom you do not find to have been a member of the  
12 conspiracy or if they were not done or said in furtherance of  
13 the conspiracy, they may be considered by you as evidence only  
14 against the member who did or said them.

15 The Indictment charges that the alleged conspiracy  
16 existed from in or about January 2008 through in or about March  
17 2011. It is not essential that the Government prove that the  
18 conspiracy started and ended in any specific month. Indeed, it  
19 is sufficient if you find beyond a reasonable doubt that the  
20 charged conspiracy was formed and that it existed for some time  
21 within the period set forth in the Indictment, and that at  
22 least one overt act was committed by any conspirator in  
23 furtherance of the charged conspiracy within that period.  
24 Count Two of the Indictment charges Mr. Balboa with  
25 participating in a conspiracy to violate the wire fraud

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1 statute. It re-alleges the same list of overt acts as in Count  
2 One.

3 In considering Count Two, you should apply the legal  
4 principles on conspiracy that I have just explained to you.  
5 Briefly, to remind you, a conspiracy has three elements, each  
6 of which must be established beyond a reasonable doubt.  
7 First, the existence of an agreement to violate the laws of the  
8 United States, here the wire fraud statutes. The wire fraud  
9 statute is codified at Title 18, Section 1343 of the United  
10 States Code. I will provide more detailed instructions on this  
11 when I instruct you on Count Four, which pertains to the  
12 substantive crime of wire fraud.

13 Second, that Mr. Balboa knowingly and willfully became  
14 a member of the conspiracy.

15 Third, that any one of the conspirators knowingly committed at  
16 least one overt act in furtherance of the conspiracy during the  
17 life of the conspiracy.

18 Count Three of the Indictment charges Mr. Balboa with  
19 committing securities fraud. As I have just told you, a  
20 conspiracy is the separate crime of agreeing to violate the law  
21 of the United States. Here, the Government contends that the  
22 substantive violation of securities fraud occurred. Whereas  
23 Count One charges a conspiracy to violate the securities laws,  
24 Count Three charges an actual violation of those laws.  
25 Count Three alleges as follows: from at least in or about

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1 January 2008 through in or about October 2008, Michael Balboa  
2 willfully and knowingly, directly and indirectly, by use of the  
3 means and instrumentalities of interstate commerce and of the  
4 mails, did use and employ manipulative and deceptive devices  
5 and contrivances in connection with the purchase and sale of  
6 securities, in violation of Title 17, Section 240.10b-5, of the  
7 Code of Federal regulations, by (a) employing devices, schemes,  
8 and artifices to defraud; (b) making untrue statements of  
9 material facts and omitting to state material facts necessary  
10 in order to make the statements made, in light of the  
11 circumstances under which they were made, not misleading; and  
12 (c) engaging in acts, practices and courses of business which  
13 operated and would operate as a fraud and deceit upon other  
14 persons, to wit, Mr. Balboa made and caused to be made false  
15 representations to investors regarding the monthly net asset  
16 value of his hedge fund and the manner in which his hedge  
17 fund's assets were valued.

18 The relevant statute is Section 10(b) of the  
19 Securities Exchange Act of 1934. That law provides in relevant  
20 part that:

21 It shall be unlawful for any person, directly or  
22 indirectly, by the use of any means or instrumentality of  
23 interstate commerce or of the mails, or any facility of any  
24 national securities exchange.

25 (b) To use or employ, in connection with the purchase

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1 or sale of any security registered on a national securities  
2 exchange or any security not so registered, any manipulative or  
3 deceptive device or contrivance in contravention of such rules  
4 and regulations as the SEC may prescribe as necessary or  
5 appropriate in the public interest or for the protection of  
6 investors.

7 Based on its authority under this statute, the SEC  
8 enacted Rule 10b-5, which provides:

9 It shall be unlawful for any person, directly or  
10 indirectly, by the use of any means or instrumentality of  
11 interstate commerce, or of the mails or of any facility of any  
12 national securities exchange,

13 (a) To employ any device, scheme, or artifice to  
14 defraud,

15 (b) To make any untrue statement of a material fact or  
16 to omit to state a material fact necessary in order to make the  
17 statements made, in the light of the circumstances under which  
18 they were made, not misleading, or

19 (c) To engage in any act, practice, or course of  
20 business which operates or would operate as a fraud or deceit  
21 upon any person, in connection with the purchase or sale of any  
22 security.

23 To establish a violation of Section 10(b), as charged  
24 in Count Three, the Government must prove each of the following  
25 elements beyond a reasonable doubt:

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1 First, that in connection with the purchase or sale  
2 securities, Mr. Balboa did any one or more of the following:

3  
4 (a) employed a device, scheme or artifice to defraud;  
5 or

6 (b) made an untrue statement of a material fact or  
7 omit to state a material fact which made what was said, under  
8 the circumstances, misleading; or

9 (c) engaged in an act, practice or course of business  
10 that operated, or would operate, as a fraud or deceit upon a  
11 purchaser or seller.

12 With respect to this element, it is not necessary that  
13 the Government establish all three. Any one is sufficient, but  
14 you have to be unanimous on which means or instrument were  
15 used.

16 Second, that Mr. Balboa acted knowingly, willfully,  
17 and with the intent to defraud; and

18 Third, that Mr. Balboa used or caused to be used any  
19 means or instrument of transportation or communication in  
20 interstate commerce or the use of the mails in furtherance of  
21 the fraudulent conduct.

22 Let's discuss each element.

23  
24 The first element that the Government must prove  
25 beyond a reasonable doubt is that, in connection with the

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1 purchase or sale of shares in Mr. Balboa's hedge fund or any of  
2 its affiliated entities, Mr. Balboa did any of the following:

3 1) Employed a device, scheme, or artifice to defraud,  
4 or

5 2) Made an untrue statement of a material fact or  
6 omitted to state a material fact which made what was said,  
7 under the circumstances, misleading, or

8 3) Engaged in an act, practice, or course of business  
9 that operated or would operate as a fraud or deceit upon the  
10 purchaser or seller.

11 The Government does not have to prove all three types  
12 of unlawful conduct in connection with the purchase or sale of  
13 securities. Any one is enough; but you must be unanimous as to  
14 which type of unlawful conduct Mr. Balboa committed. I will  
15 now define some of these terms.

16 A device, scheme or artifice to defraud is a plan to  
17 accomplish any fraudulent objective. Fraud is a general term  
18 that embraces all the various means individuals employ to take  
19 advantage of others by manipulative and deceptive acts. The  
20 fraudulent or deceitful conduct alleged need not relate to the  
21 investment value of the securities involved in this case.

22 A statement, representation, claim or document is  
23 false if it is untrue when made and was then known to be untrue  
24 by the person making it or causing it to be made. A  
25 representation or statement is fraudulent if it was made with

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1 the intent to deceive. The concealment of material facts in a  
2 manner that makes what is said or represented deliberately  
3 misleading may also constitute false or fraudulent statements  
4 under the statute.

5 The deception need not be based upon spoken or written  
6 words alone. The arrangement of the words or the circumstances  
7 in which they are used may convey the false and deceptive  
8 practice. If there is deception, the manner in which it is  
9 accomplished does not matter.

10 The requirement that the fraudulent conduct be "in  
11 connection with" a securities transaction is satisfied so long  
12 as there was some nexus or relationship between the allegedly  
13 fraudulent conduct and the sale or purchase of securities.  
14 Fraudulent conduct may be "in connection with" the purchase or  
15 sale of securities if you find that the alleged fraudulent  
16 conduct "touched upon" a securities transaction. You need not  
17 find that Mr. Balboa agreed to actually participate in any  
18 securities transaction, if Mr. Balboa agreed to engage in  
19 fraudulent conduct that was "in connection with" a purchase or  
20 sale. The "in connection with" aspect of this element is  
21 satisfied if you find that there was some nexus or relation  
22 between the allegedly fraudulent conduct and the sale or  
23 purchase of securities.

24 It is no defense to an overall scheme to defraud that  
25 Mr. Balboa was not involved in the scheme from its inception or

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1 played only a minor role with no contact with the investors and  
2 purchasers of the securities in question. Nor is it necessary  
3 for you to find that Mr. Balboa was the actual seller or  
4 offeror of the securities. It is sufficient if Mr. Balboa  
5 participated in the scheme or fraudulent conduct that involved  
6 the purchase or sale of stock. By the same token, the  
7 Government need not prove that Mr. Balboa personally made the  
8 misrepresentation. It is sufficient if the Government  
9 establishes that Mr. Balboa caused the statement to be made.  
10 With regard to the alleged misrepresentations, you must  
11 determine whether the statement was true or false when it was  
12 made.

13           Next, if you find that there was a false statement or  
14 an omitted statement, you must determine whether the  
15 misrepresentation or omission was material under the  
16 circumstances. A material fact is one that would have been  
17 important to a reasonable investor in making an investment  
18 decision. In other words, the misstated or omitted fact must  
19 have altered the total mix of information available and was of  
20 such importance that it could reasonably be expected to cause  
21 or to induce a person to invest or not to invest. The  
22 securities fraud statute does not prohibit misstatements or  
23 omissions that would not be important to a reasonable investor.  
24 We use the word "material" to distinguish between the kinds of  
25 statements that reasonable investors care about and those that

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1 are of no real importance.

2 It is not a defense to say that the misrepresentation  
3 or omission would not have deceived a person of ordinary  
4 intelligence. If you find that there was a misrepresentation  
5 of material fact, it does not matter whether the intended  
6 victims were gullible buyers or sophisticated investors. The  
7 securities laws protect the gullible and unsophisticated as  
8 well as the experienced investor.

9 Nor does it matter whether the alleged unlawful scheme  
10 was successful, profitable or otherwise beneficial to Mr.  
11 Balboa. Success is not an element of the crime charged. If  
12 you find that Mr. Balboa expected to or did profit from the  
13 alleged scheme, however, you may consider that in relation to  
14 the element of intent, which I will now explain.

15 The second element of securities fraud is that Mr.  
16 Balboa acted knowingly, willfully, and with intent to defraud.  
17 To act "knowingly" means to act voluntarily and deliberately,  
18 rather than mistakenly or inadvertently.

19 To act "willfully" means to act knowingly and  
20 purposely, with intent to do something the law forbids, that is  
21 to say, with bad purpose either to disobey or to disregard the  
22 law.

23 "Intent to defraud" means to act knowingly and with  
24 the specific intent to deceive.

25 The question of whether a person acted knowingly,

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1 willfully and with intent to defraud is a question of fact for  
2 you to determine, like any other fact question. This question  
3 involves one's state of mind.

4 As I also stated before, we cannot examine what is  
5 going on in a person's brain; so direct proof of knowledge and  
6 fraudulent intent is not required. Rather, knowledge and  
7 fraudulent intent may be established by circumstantial  
8 evidence, based upon a person's outward manifestations, words,  
9 conduct, and all the surrounding circumstances disclosed by the  
10 evidence and the rational or logical inferences that may be  
11 drawn therefrom. Remember what I told you before-use your  
12 common sense.

13 The third element of securities fraud is that Mr.  
14 Balboa used or caused to be used an instrumentality of  
15 interstate commerce or the mails in furtherance of the scheme  
16 to defraud or fraudulent conduct.

17 It is not necessary that Mr. Balboa be directly or  
18 personally involved in any contemplated mailing or use of an  
19 instrumentality of interstate commerce. If the conduct alleged  
20 to be an object of the scheme would naturally and probably  
21 result in the use of the mails or an instrumentality of  
22 interstate commerce, this element is satisfied.

23 Nor is it necessary that the items sent through the mails or  
24 communicated through an instrumentality of interstate commerce  
25 contain the fraudulent material, or anything criminal or

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1 objectionable. The matter mailed or communicated may be  
2 entirely innocent, so long as it is in furtherance of the  
3 scheme to defraud or fraudulent conduct.

4 The use of the mails or instrumentalities of  
5 interstate commerce need not be central to the execution of the  
6 scheme or even be incidental to it. All that is required is  
7 that the use of the mails or instrumentality of interstate  
8 commerce bear some relation to the object of the scheme or  
9 fraudulent conduct.

10 The actual purchase or sale of a security need not be  
11 accompanied by the use of the mails or instrumentality of  
12 interstate commerce, so long as the mails or instrumentality of  
13 interstate commerce are used in furtherance of the scheme and  
14 Mr. Balboa is still engaged in actions that are a part of a  
15 fraudulent scheme.

16 The term "mails" is self-explanatory, and includes  
17 both the U.S. Mail and Federal Express. The term "interstate  
18 commerce" means trade, commerce, transportation, or  
19 communication between any two states or between any foreign  
20 country and any state. This term includes the use of a  
21 telephone, email, or other interstate means of communication.

22 Count Four charges Mr. Balboa with a substantive count  
23 of wire fraud, i.e. using an interstate wire facility in  
24 furtherance of a fraud. In order to prove Mr. Balboa guilty of  
25 wire fraud, the Government must separately establish beyond a

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1 reasonable doubt the following three essential elements:

2 First, that in or about the times alleged in the  
3 Indictment, there was a scheme or artifice to defraud others of  
4 money or property by false or fraudulent pretenses,  
5 representations, or promises;

6 Second, that Mr. Balboa knowingly and willfully  
7 devised or participated in the scheme or artifice to defraud,  
8 with knowledge of its fraudulent nature and with specific  
9 intent to defraud; and

10 Third, that in the execution of that scheme, Mr.  
11 Balboa used, or caused the use by others, of interstate or  
12 foreign wires, as specified in the Indictment.

13 The first element of wire fraud is the existence of a  
14 scheme or artifice to defraud others of money or property by  
15 means of false or fraudulent pretenses, representations, or  
16 promises.

17 A "scheme or artifice" is simply a plan for the  
18 accomplishment of an object. A "scheme to defraud" is any  
19 plan, device, or course of action to obtain money or property  
20 by means of false or fraudulent pretenses, representations, or  
21 promises.

22 "Fraud" is a general term that includes all the  
23 possible means by which a person seeks to gain some unfair  
24 advantage over another person by intentional misrepresentation,  
25 false suggestion or concealing of the truth. That unfair

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1 advantage can involve money, property, or any other thing of  
2 value.

3 Thus, a "scheme or artifice to defraud" is any plan,  
4 device, or course of action to deprive another of money or  
5 property by means of false or fraudulent pretenses,  
6 representations, or promises. It is a plan to deprive another  
7 of money or property by trick, deceit or deception.

8 In order to establish a scheme to defraud, the  
9 Government need not show that Mr. Balboa made a  
10 misrepresentation. A scheme to defraud can exist even if the  
11 scheme did not progress to the point where misrepresentations  
12 would be made. In addition, even if you find that the  
13 statements the Government contends were made or contemplated by  
14 Mr. Balboa in furtherance of the scheme were literally true,  
15 you can still find that the first element of the wire fraud  
16 statute has been satisfied if the statements and/or conduct of  
17 Mr. Balboa were intended to deceive.

18 A scheme to defraud need not be shown by direct  
19 evidence, but may be established by all the circumstances and  
20 facts in the case.

21 A statement, representation, or document is fraudulent  
22 if it was made falsely and with intent to deceive. A  
23 representation, statement, claim, or document may also be  
24 fraudulent if it contains half-truths or if it conceals  
25 material facts in a manner which makes what is said or

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1 represented deliberately misleading or deceptive.

2           The false or fraudulent representation must relate to  
3 a material fact or matter. A material fact is one which would  
4 reasonably be expected to be of concern to a reasonable and  
5 prudent person in relying upon the representation or statement  
6 in making a decision, based on the total mix of information  
7 available. This means that if you find a particular statement  
8 was false or that it concealed facts that made what was said  
9 deliberately misleading, you must determine whether that  
10 statement was one that a reasonable individual or entity would  
11 have considered important in making decisions regarding, for  
12 example, whether to invest money.

13           In addition to proving that a statement was false or  
14 fraudulent and related to a material fact, in order to  
15 establish a scheme to defraud, the Government must prove that  
16 the alleged scheme contemplated depriving another of money or  
17 property. It is not necessary for the Government to establish  
18 that any particular person actually relied on, or actually  
19 suffered damages, as a consequence of any fraudulent  
20 representation or concealment of facts by Mr. Balboa. Nor is  
21 it necessary for the Government to establish that the scheme  
22 actually succeeded; that is, that Mr. Balboa-or any other  
23 participant in the scheme-actually realized any gain from the  
24 scheme or that the intended victim suffered any loss. You must  
25 concentrate on whether there was such a scheme, not on the

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1 consequences of the scheme.

2 In this regard, a person is not deprived of money or  
3 property only when someone directly takes money or property  
4 from them. Rather, a person is also deprived of money or  
5 property when that person is provided false or fraudulent  
6 information that, if believed, would prevent them from being  
7 able to make informed decisions about what to do with their  
8 money or property. In other words, a person is deprived of  
9 money or property when they are deprived of the right to  
10 control that money or property, which occurs when they receive  
11 false or fraudulent statements that affect their ability to  
12 make discretionary economic decisions about what to do with  
13 that money or property.

14 With regard to the first element of wire fraud, if you  
15 find that the Government has sustained its burden of proof that  
16 a scheme to defraud, as charged, did exist then you should next  
17 consider the second element of wire fraud.

18 The second element of the crime of wire fraud is that  
19 a defendant devised or participated in a fraudulent scheme  
20 knowingly, willfully, and with specific intent to defraud.

21 The words "devise" and "participate" are words that  
22 you are familiar with and, therefore, I do not need to spend  
23 much time defining them for you. To "devise" a scheme to  
24 defraud is to concoct or plan it. To "participate" in a scheme  
25 to defraud means to associate oneself with it with a view and

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1 intent toward making it succeed. While a mere onlooker is not  
2 a participant in a scheme to defraud, it is not necessary that  
3 a participant be someone who personally and visibly executes  
4 the scheme to defraud.

5 In order to satisfy this element, it is not necessary  
6 for the Government to establish that Mr. Balboa originated the  
7 scheme to defraud. It is sufficient if you find that a scheme  
8 to defraud existed, even if originated by another, and that Mr.  
9 Balboa, while aware of the scheme's existence, knowingly  
10 participated in it.

11 A person can be found to be a participant in a scheme  
12 even if he or she does not have knowledge of all of the  
13 operations of such a scheme, and even if he or she does not  
14 participate in all of the scheme's operations. The guilt of  
15 Mr. Balboa is not governed by the extent of his participation.

16 A person can be found to be a participant in a scheme  
17 even if he or she did not participate in such a scheme from the  
18 beginning. A person who comes in at a later point with  
19 knowledge of the scheme's general operation, although not  
20 necessarily all of its details, and intentionally acts in a way  
21 to further the unlawful goals, becomes a member of the scheme  
22 and is legally responsible for all that may have been done in  
23 the past in furtherance of the criminal objective and all that  
24 is done thereafter.

25 "Intent to defraud" means that Mr. Balboa had some

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1 realization of the fraudulent or deceptive character of the  
2 scheme and had an intention to be involved in the scheme to  
3 defraud and to help it succeed with a purpose of causing some  
4 harm or injury to the victim. The Government need not prove  
5 that the intended victim was actually harmed; only that such  
6 harm was contemplated.

7 The question of whether a person acted knowingly,  
8 willfully, and with intent to defraud is a question of fact.  
9 This question involves one's state of mind. As I explained to  
10 you earlier, direct proof of knowledge and fraudulent intent is  
11 almost never available, and such direct proof is not required.  
12 The ultimate facts of knowledge and criminal intent, though  
13 subjective, may be established by circumstantial evidence,  
14 based upon a person's outward manifestations, words, conduct,  
15 acts and all the surrounding circumstances disclosed by the  
16 evidence and the rational or logical inferences that may be  
17 drawn therefrom.

18 The third and final element that the Government must  
19 establish beyond a reasonable doubt is the use of an interstate  
20 or international wire communication in furtherance of the  
21 scheme to defraud. Wire communications include telephone calls,  
22 faxes and electronic mail. "Interstate" means that the wire  
23 communication must pass between two or more states as, for  
24 example, a telephone call or wire transmission of computer  
25 signals or funds between New York and another state.

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1 "International" means that the wire communication must pass  
2 between the United States and another country.

3 The use of the wire need not itself be fraudulent.  
4 Stated another way, the material wired need not contain any  
5 fraudulent representation. It is sufficient if one or more  
6 wires were used to further or assist in carrying out the scheme  
7 to defraud.

8 It is not necessary for Mr. Balboa to be directly or  
9 personally involved in any wire communication, as long as the  
10 communication is reasonably foreseeable in the execution of the  
11 alleged scheme to defraud in which Mr. Balboa is accused of  
12 participating. In this regard, it would be sufficient to  
13 establish this element of the crime if the evidence justifies a  
14 finding that Mr. Balboa caused the wires to be used by others.  
15 This does not mean that Mr. Balboa must have specifically  
16 authorized others to execute a wire communication. When a  
17 person does an act with knowledge that the use of the wire will  
18 follow in the ordinary course of business, or where such use of  
19 the wires can reasonably be foreseen, even though not actually  
20 intended, then he or she causes the wires to be used.

21 The Government must establish beyond reasonable doubt  
22 the particular use charged in the Indictment. However, the  
23 Government does not have to prove that an interstate or foreign  
24 wire was used on any exact dates charged in the Indictment. It  
25 is sufficient if the evidence establishes that a wire was used

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1 on a date reasonably near the time period alleged in the  
2 Indictment.

3 Finally, if you find that the wire communication was  
4 reasonably foreseeable and that the interstate or international  
5 wire communications took place, then this element is satisfied  
6 even if it was not foreseeable that the wire communication  
7 would cross state or country lines. However, if you find that  
8 wire communications were used in furtherance of the scheme to  
9 defraud, you must be unanimous as to the particular wire  
10 communications that occurred.

11 Specifically, Count Five of the Indictment charges Mr.  
12 Balboa, in his capacity as an investment advisor, with engaging  
13 in fraudulent conduct toward investors and potential investors  
14 in the Hedge Fund or any of its affiliated entities.  
15 Specifically, it alleges that:

16 From in or about January 2008 to October 2008, Michael  
17 Balboa, acting as an investment adviser with respect to  
18 investors and potential investors in his hedge fund, willfully  
19 and knowingly, by use of the mails and means and  
20 instrumentalities of interstate commerce, directly and  
21 indirectly, did (a) employ devices, schemes, and artifices to  
22 defraud clients and prospective clients; (b) engaged in  
23 transactions, practices, and courses of business which operated  
24 as a fraud and deceit upon clients and prospective clients; and  
25 (c) engaged in acts, practices and courses of business that

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1 were fraudulent, deceptive, and manipulative: to wit, Mr.  
2 Balboa provided the independent valuation agent with  
3 artificially inflated month-end prices for the Nigerian  
4 Warrants in order to falsely overstate the monthly net asset  
5 value of the hedge fund.

6 The relevant investment advisor fraud statutes and  
7 regulations are found at Title 15 of the United States Code,  
8 Sections 80b-6 and 80b-17. Section 80b-6 provides that: "It  
9 shall be unlawful for any investment advisor by use of the  
10 mails or any means or instrumentality of interstate commerce,  
11 directly or indirectly (a) to employ any devise, scheme or  
12 artifice to defraud any client or prospective client; (b) to  
13 engage in any transaction, practice or course of business which  
14 operates as a fraud or deceit upon any client or prospective  
15 client; or (c) to engage in any act, practice, or course of  
16 business that was fraudulent, deceptive or manipulative."

17 (Continued on next page)  
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23  
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1           Section 80b-17 is a general penalty provision of the  
2           Investment Advisor Act which makes it unlawful to willfully  
3           violate its provisions or any rule or regulation thereunder,  
4           and it provides in pertinent part as follows: "Any person who  
5           willfully violates any provision of this subchapter or any  
6           rule, regulation or order promulgated by the SEC under  
7           authority thereof, shall be guilty of an offense against the  
8           United States."

9           I will now turn to an explanation of the investment  
10          advisor fraud charge. In order to prove a defendant guilty of  
11          this crime, the Government must prove all four of the following  
12          elements:

13                 First, Mr. Balboa was an investment advisor;

14                 Second, Mr. Balboa did one of the following: (a)  
15                 employed a device, scheme, or artifice to defraud an actual or  
16                 prospective investor in the Hedge Fund or its affiliated  
17                 entities; or (b) engaged in a transaction, practice, or course  
18                 of business which operated as a fraud and deceit upon those  
19                 investors or prospective investors; or (c) engaged in an act,  
20                 practice, and course of business that was fraudulent,  
21                 deceptive, and manipulative;

22                 The third element is that Mr. Balboa devised or  
23                 participated in such alleged device, scheme or artifice to  
24                 defraud, or engaged in such alleged transaction, practice, or  
25                 course of business, knowingly, willfully, and with the intent

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1 to defraud;

2 Finally, fourth, Mr. Balboa employed such alleged  
3 device, scheme, or artifice to defraud, or engaged in such  
4 alleged transaction, practice, or course of business, by the  
5 use of the mails or an instrumentality of interstate commerce.

6 Now, the first element the Government must prove is  
7 that Mr. Balboa was an investment advisor at the time he is  
8 alleged to have committed investment advisor fraud. Title 15,  
9 United States Code, Section 80(b)(2) defines the term  
10 "investment advisor" as applied to this Act. It provides, in  
11 pertinent part, as follows: "Investment advisor means any  
12 person who, for compensation, engages in the business of  
13 advising others, either directly or through publications or  
14 writings, as to the value of securities or as to the  
15 advisability of investing in, purchasing or selling securities,  
16 or who, for compensation and as part of a regular business,  
17 issues or promulgates analyses or reports concerning  
18 securities, but does not include any broker or dealer whose  
19 performance of such services is solely incidental to the  
20 conduct of his business as a broker or dealer and who receives  
21 no special compensation therefor."

22 Thus, to determine whether Mr. Balboa is an investment  
23 advisor under the Act, you have to consider three factors:

24 First, whether Mr. Balboa provided advice or advisor  
25 issued reports or analyses regarding the securities;

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1           Second, whether Mr. Balboa was in the business of  
2 providing such advice; and

3           Third, whether Mr. Balboa was provided compensation  
4 for such advice.

5           These factors pertain to your consideration of the  
6 first element of Count Five of the Indictment.

7           Now, the second element that the Government must prove  
8 is that Mr. Balboa did any one or more of the following things:  
9 (A) employed a devise, scheme, or artifice to defraud actual or  
10 prospective investors in the Hedge Fund or its affiliated  
11 entities; or (B) engaged in a transaction, practice, or course  
12 of business which operated as a fraud and deceit upon those  
13 actual or prospective investors; or (C) engaged in an act,  
14 practice, or course of business that was fraudulent, deceptive,  
15 and manipulative.

16           Any one of these types of alleged fraudulent conduct,  
17 if proven by the Government beyond a reasonable doubt, is  
18 sufficient. However, you must be in unanimous in your  
19 agreement as to which type of unlawful conduct, if any, has  
20 been proven by the Government.

21           I have previously defined the terms and phrases I  
22 used -- such as what constitutes a scheme to defraud, what is  
23 fraud, what is considered deceptive conduct and so forth -- and  
24 you are to follow those instructions here.

25           The third element the Government must prove beyond a

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1 reasonable doubt is that Mr. Balboa devised or participated in  
2 the alleged device, scheme, or artifice to defraud, or engaged  
3 in the allegedly fraudulent transaction, practice, or course of  
4 business, knowingly and willfully, and with a specific intent  
5 to defraud. I have already explained these terms to you and  
6 you are to apply those instructions here.

7           The fourth and final element the Government must prove  
8 is that Mr. Balboa knowingly caused or caused to be used the  
9 mails or an instrumentality of interstate commerce, such as  
10 interstate telephone or wire communications in furtherance of  
11 the alleged scheme to defraud, or the allegedly fraudulent  
12 conduct specified in the indictment. As I have told you, the  
13 term instrumentality of interstate commerce means instruments,  
14 devices and means of conducting trade, commerce,  
15 transportation, or communication among any two states, or  
16 between this country and a foreign country. It is not  
17 necessary that Mr. Balboa be directly or personally involved in  
18 mailing or use of the interstate instrumentality. If Mr.  
19 Balboa was an active participant in the scheme and took steps  
20 or engaged in conduct which he knew or could reasonably foresee  
21 would naturally and probably result in the use of mails or  
22 interstate wires, then you may find that he caused them to be  
23 used. The items allegedly sent through the mails or  
24 communicated through the instrumentality of interstate  
25 commerce, need not have contained fraudulent material or

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1 anything criminal or objectionable, nor need they be central to  
2 the execution of the alleged scheme to defraud or allegedly  
3 fraudulent conduct and may even be incidental to it. All that  
4 is required is that the use of the mails or instrumentalities  
5 must bear some relation to the object of the alleged scheme or  
6 conduct.

7 That concludes my instructions to you on Count Five,  
8 the last count of the Indictment.

9 Now I want to say something about good faith.

10 Since an essential element of the crimes charged is  
11 intent to defraud, it follows that good faith on the part of  
12 Mr. Balboa is a complete defense to all of the charges against  
13 him. Under the antifraud statutes, even false representations  
14 or statements or omissions of material facts do not amount to a  
15 fraud unless done with fraudulent intent. However misleading  
16 or deceptive a plan may be, it is not fraudulent if it was  
17 carried out in good faith. An honest belief in the truth of  
18 the representations made by the defendant is a complete  
19 defense, however inaccurate the statements may turn out to be.  
20 Mr. Balboa has no burden to establish a defense of good faith.  
21 An honest mistake in judgment or an honest error in management  
22 does not rise to the level of criminal conduct. The burden is  
23 on the Government to prove beyond a reasonable doubt the  
24 fraudulent intent and consequent lack of good faith beyond a  
25 reasonable doubt.

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1           A defendant does not act in good faith if, even though  
2 he or she honestly holds a certain opinion or belief, that  
3 defendant also knowingly makes false or fraudulent statements,  
4 representations or promises to others. The law is written to  
5 subject to criminal punishment only those people who knowingly  
6 attempt to defraud by means of false or fraudulent pretenses,  
7 representations, or promises.

8           Now, in considering whether or not Mr. Balboa acted in  
9 good faith, you are instructed that a belief by Mr. Balboa, if  
10 such belief existed, that ultimately everything would work out  
11 so that no investor would lose any money does not require a  
12 finding by you that he acted in good faith. No amount of  
13 honest belief his part that the scheme will ultimately make a  
14 profit for the investors will excuse fraudulent actions or  
15 false representations by him.

16           As a practical matter, then, in order to sustain the  
17 charges against Mr. Balboa, the Government must establish  
18 beyond a reasonable doubt that Mr. Balboa knew that his conduct  
19 was calculated to deceive and, nonetheless, associated himself  
20 with the alleged fraudulent scheme.

21           The Government may prove that Mr. Balboa acted  
22 knowingly and willfully in either of two ways. First, it is  
23 sufficient if the evidence satisfies you beyond a reasonable  
24 doubt that Mr. Balboa was actually aware that he was making or  
25 causing a false statement to be made, or omitting, or causing

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1 to be omitted, a material fact. Second, Mr. Balboa's knowledge  
2 may be established by proof that he was aware of a high  
3 probability the statement was false, or that a material  
4 statement was omitted, unless, despite this high probability,  
5 the facts show that he believed the statement to be true or  
6 that the material fact was not omitted. This concept is known  
7 as conscious avoidance. However, if you find that Mr. Balboa  
8 acted in good faith, then there can be no conscious avoidance.

9 About conscious avoidance. As I have explained, the  
10 Indictment requires the Government to prove that Mr. Balboa  
11 acted knowingly. The Government can also meet its burden by  
12 showing beyond a reasonable doubt that Mr. Balboa acted with  
13 deliberate disregard for whether the statements at issue were  
14 true or false or contained material omissions, or with  
15 deliberate disregard for whether the information was disclosed  
16 by those who had a duty to disclose it, with the conscious  
17 purpose of avoiding learning the truth

18 In determining whether Mr. Balboa acted knowingly, you  
19 may consider whether he deliberately closed his eyes to what  
20 would otherwise have been obvious. Although the necessary  
21 knowledge on the part of Mr. Balboa with respect to each of the  
22 charges cannot be established by showing that he was careless,  
23 negligent, or foolish, Mr. Balboa may not willfully and  
24 intentionally remain ignorant of a fact material and important  
25 to his conduct in order to escape the consequences of criminal

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1 law.

2 Thus, knowledge of the existence of a particular fact  
3 is established if a person is aware of a high probability of  
4 its existence, unless you find that the person actually  
5 believed that the fact did not exist. In other words, Mr.  
6 Balboa cannot avoid criminal responsibility for his own conduct  
7 by "deliberately closing his eyes," or remaining purposefully  
8 ignorant of facts which would confirm to him that he was  
9 engaged in criminal conduct.

10 With respect to the substantive counts -- I am almost  
11 finished, just a few more pages -- Counts Three, Four and  
12 Five -- each of these counts also charges Mr. Balboa with  
13 violating Section 2, Title 18 of the United States Code, the  
14 "aiding and abetting" statute. That is, Mr. Balboa is charged  
15 not only as a principal who committed the crime, but also as an  
16 aider and abettor and with having willfully caused the crime.  
17 As a result, there are two additional ways that the Government  
18 may establish Mr. Balboa's guilt on these counts -- Counts 3,  
19 4, and 5: One way is called "aiding and abetting," and the  
20 other is called "willfully causing a crime."

21 "Aiding and abetting" is set forth in Section 2(a) of  
22 Title 18, which provides:

23 "Whoever commits an offense against the United States  
24 or aids or abets or counsels, commands or induces, or procures  
25 its commission, is punishable as a principal."

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1 Under the aiding and abetting statute, it is not  
2 necessary for the Government to show that Mr. Balboa himself  
3 physically committed the crime with which he is charged in  
4 order for you to find him guilty. Thus, even if you do not  
5 find Mr. Balboa himself committed the crime charged, you may,  
6 under certain circumstances, still find him guilty of that  
7 crime as an aider or abettor.

8 A person who aids or abets another to commit an  
9 offense is just as guilty of that offense as if he or she  
10 committed it himself or herself. Accordingly, you may find  
11 that Mr. Balboa guilty of the substantive crime if you find  
12 that the Government has proved that another person actually  
13 committed the crime, and that Mr. Balboa aided and abetted that  
14 person in the commission of the offense.

15 As you can see, the first requirement is that another  
16 person has committed the crime charged. Obviously, no one can  
17 be convicted of aiding and abetting the criminal act of another  
18 if no crime was committed by the other person in the first  
19 place. But if you find that a crime was committed, then you  
20 must consider whether Mr. Balboa aided or abetted the  
21 commission of the crime.

22 In order to aid and abet another to commit a crime, it  
23 is necessary that a defendant willfully and knowingly associate  
24 himself or herself in some way with the crime, and that he or  
25 she willfully and knowingly seek by some act to help make the

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1 crime succeed.

2 Participation in a crime is willful if the action is  
3 taken voluntarily and intentionally, or, in the case of a  
4 failure to act, with the specific intent to fail to do  
5 something the law requires to be done; that is to say, with a  
6 bad purpose either to disobey or to disregard the law.

7 The mere presence of Mr. Balboa where a crime is being  
8 committed, even coupled with the knowledge by Mr. Balboa that a  
9 crime is being committed, or the mere acquiescence by Mr.  
10 Balboa in the criminal conduct of others, even with guilty  
11 knowledge, is not sufficient to establish aiding and abetting.  
12 An aider and abettor must have some interest in the criminal  
13 venture.

14 To determine whether Mr. Balboa aided or abetted the  
15 commission of the crime with which he is charged, ask yourself  
16 these questions:

17 -- Did he participate in the crime charged as  
18 something he wished to bring about?

19 -- Did he associate himself with the criminal venture  
20 knowingly and willfully? .

21 -- And, three, did he seek by his actions to make the  
22 criminal venture succeed?

23 If he did, then Mr. Balboa is an aider and abettor,  
24 and therefore guilty of the offense. If he did not, then he is  
25 not an aider and abettor, and he is not guilty as an aider and

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1 abettor of that offense

2 The second way in which the Government can prove a  
3 defendant's guilt under Section 2, Title 18 of the United  
4 States Code on Counts Three, Four and Five is if you find that  
5 the Defendant willfully caused a crime. Section 2(b) of the  
6 aiding and abetting statute relates to willfully causing a  
7 crime, reads as follows:

8 "Whoever willfully causes an act to be done which if  
9 directly performed by him or another would be an offense  
10 against the United States [shall be guilty of a federal crime].

11 The term "willfully caused" does not mean that a  
12 defendant himself need have physically committed the crime or  
13 supervised or participated in the actual criminal conduct  
14 charged in the Indictment. Rather, the meaning of the term  
15 "willfully caused" can be found in the answers to the following  
16 questions:

17 -- First, did Mr. Balboa take some action without  
18 which the crime would not have occurred?

19 -- Second, did Mr. Balboa intend that the crime would  
20 be actually committed by others?

21 If you are persuaded beyond a reasonable doubt that  
22 the answer to both questions is "yes" then Mr. Balboa is guilty  
23 of the crime just as if he had actually committed it.

24 In addition to the elements of each of the crimes  
25 charged in Counts One, Two, Three, Four, and Five, you must

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1 decide whether any act in furtherance of the unlawful activity  
2 charged occurred within the Southern District of New York. The  
3 Southern District of New York includes Manhattan, the Bronx,  
4 Westchester, Putnam and Rockland, but does not include Queens,  
5 Brooklyn, Nassau, and Suffolk. It is sufficient to satisfy the  
6 venue requirement if any act by anyone in furtherance of the  
7 crime charged occurred within the Southern District of New  
8 York.

9 I should note that on this issue -- and this issue  
10 alone -- the Government need not prove venue beyond a  
11 reasonable doubt, but only by a mere preponderance of the  
12 evidence. A "preponderance of the evidence" means that  
13 something is more likely so than not. Thus, the Government has  
14 satisfied its venue obligations if you conclude that it is more  
15 likely than not that any act in furtherance of the crime  
16 charged occurred within this District. If you find that the  
17 Government has failed to prove this venue requirement, then you  
18 must find Mr. Balboa not guilty of the count that you are  
19 considering.

20 Now, concluding instructions.

21 You are about to go into the jury room and begin your  
22 deliberations. Your function now is to weigh the evidence in  
23 this case and to determine whether the Government has proven  
24 beyond a reasonable doubt that Mr. Balboa is guilty of the  
25 offenses charged in the Indictment. Remember, you have to

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1 consider each count separately.

2 You must base your verdict solely on the evidence and  
3 these instructions as to the law, and you are obliged under  
4 your oath as jurors to follow the law as I have instructed you,  
5 whether you agree or disagree with the particular law in  
6 question.

7 The verdict must represent the considered judgment of  
8 each juror. In order to return a verdict, it is necessary that  
9 each juror agree to it. Your verdict must be unanimous. If  
10 you are divided, do not report how the vote stands, and if you  
11 have reached a verdict do not report what it is until you are  
12 asked in open court.

13 When you retire to the jury room, you must have a  
14 foreperson. That person will preside over your deliberations  
15 and speak for you here in open court. Other than those  
16 functions, the foreperson will have no greater or lesser  
17 authority than any other juror.

18 It is my custom to select Juror Number One in every  
19 case to be the foreperson of the jury. Accordingly, I am now  
20 selecting Juror Number One, Mr. Albstein, as your foreperson.

21 It is your duty as jurors to consult with one another  
22 and to deliberate with a view to reaching an agreement. You  
23 must each decide the case for yourself, but you should do so  
24 only after discussing the case with your fellow jurors, and you  
25 should not hesitate to change your opinion when you are

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1 convinced that it is erroneous. Because it is essential that  
2 every juror considers all the facts and arguments before  
3 reaching a decision, all of you must be present in order to  
4 deliberate. If any juror takes a break during the course of  
5 your deliberations, you must stop discussing the case until he  
6 or she returns. Similarly, if any juror arrives late in the  
7 morning, you cannot commence your deliberations until all  
8 twelve of you are present.

9 For your deliberations, you will be provided with  
10 copies of these instructions, as I have already told you, and  
11 copies of the indictment. You will be provided with one  
12 verdict sheet on which you will record your verdict.

13 I am going to send the exhibits received in evidence  
14 into the jury room. If you want any of the testimony read, you  
15 can also request that. Please remember that it is not always  
16 easy to locate what you might want, so be as specific as you  
17 possibly can in requesting the testimony or portions of the  
18 testimony. If you want further explanation of the law as I  
19 have explained it to you, you may also request that from the  
20 Court. If there is any doubt or question about the meaning of  
21 any part of the charge, you can ask for clarification or  
22 further explanation.

23 Your requests -- or any other communication you wish  
24 to make with the Court -- should be made to me in writing,  
25 signed by your foreperson, and given to one of the marshals who

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1 will be protecting you. Bear in mind that you are never to  
2 reveal to any person - not even to the Court - how you, the  
3 jury, stand, numerically or otherwise, on the questions before  
4 you, until after you have reached a unanimous verdict.

5 Your decision, as I said, must be unanimous, but you  
6 are not bound to surrender your honest beliefs concerning the  
7 effect or weight of the evidence for the mere purpose of  
8 returning a verdict or solely because of the opinion of other  
9 jurors. Discuss and weigh your respective opinions  
10 dispassionately, without regard to sympathy, prejudice or favor  
11 for either party, and adopt that conclusion that in your good  
12 conscience appears to be in accordance with the truth.

13 Some of you have taken notes during the trial. As I  
14 told you at the beginning of the trial, this is permitted  
15 because some people, including myself, find that taking notes  
16 helps them focus on the testimony being given. Your notes are  
17 for your private use only, as a way to help you recall the  
18 testimony as you begin your deliberations. A juror's notes are  
19 not entitled to any greater weight than the recollection of a  
20 juror who did not take notes.

21 Again, each of you must make your own decision about  
22 the proper outcome of this case based on your consideration of  
23 the evidence and your discussions with your fellow jurors. No  
24 juror should surrender his conscientious beliefs solely for the  
25 purpose of reaching a unanimous verdict. Your verdict must be

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1 based solely upon the evidence introduced at trial or the lack  
2 of evidence. It is improper for you to consider any personal  
3 feelings you may have about the defendant's race, religion,  
4 national origin, gender, or age. The parties in this case are  
5 entitled to a trial free from prejudice and our judicial system  
6 cannot work unless you reach your verdict through a fair and  
7 impartial consideration of the evidence before you.

8 Your function now is to weigh the evidence in this  
9 case and to determine whether the Government has or has not  
10 established Mr. Balboa's guilt beyond a reasonable doubt with  
11 respect to each count of the Indictment. You must base your  
12 verdict solely on the basis of the evidence and these  
13 instructions as to the law.

14 You are obliged by your oath as jurors to follow the  
15 law as I instruct you, regardless of whether you agree or  
16 disagree with the particular law in question. Remember at all  
17 times that you are not partisans. You are judges - judges of  
18 the facts. Your sole interest is to seek the truth from the  
19 evidence in this case.

20 The verdict must represent the considered judgment of  
21 each juror. In order to return a verdict, it is necessary for  
22 each juror to agree. That means that your verdict has to be  
23 unanimous. You should consult with one another and deliberate  
24 with a view towards reaching an agreement. Each of you must  
25 decide the case for himself or herself, but only after

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1 impartial discussion and consideration of all the evidence in  
2 the case with your fellow jurors. In the course of your  
3 deliberations, do not hesitate to re-examine your own views and  
4 change your opinion if you become convinced it is erroneous.  
5 Do not surrender your honest convictions as to the weight or  
6 effect of evidence solely because of the opinions of your  
7 fellow jurors.

8 I will see counsel at the sidebar.

9  
10 (Continued on next page)

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1 (At the sidebar)

2 MR. MILLER: Nothing from us.

3 THE COURT: Any objections?

4 MR. TACOPINA: Your Honor, we have a couple of issues,  
5 Mr. Seigel can do it.

6 MR. SEIGEL: Your Honor, on page 15 with regard to  
7 regulatory witnesses, you omitted reference -- I will wait for  
8 your Honor to get there.

9 THE COURT: Page 15?

10 MR. SEIGEL: Yes, the last sentence dealing with  
11 regulatory witnesses, your Honor stated: "It is your decision,  
12 after reviewing all the evidence, whether to accept the  
13 testimony of Mr. Howard and to give that testimony whatever  
14 weight." You omitted the next two words "if any" -- "you find  
15 it deserves." "If any" is a standard and required qualifier in  
16 the jury instructions so the jury does not impermissibly --

17 THE COURT: What did I omit?

18 MR. SEIGEL: "If any."

19 THE COURT: All right. I will reread that.

20 MR. SEIGEL: Thank you.

21 Likewise.

22 THE COURT: Yes, Mr. Seigel.

23 MR. SEIGEL: On page 29.

24 THE COURT: Yes, sir.

25 MR. SEIGEL: The Court, dealing with the first

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1 element, fraudulent act, in the last sentence of that first  
2 section read: "Anyone is enough" -- I will just read the whole  
3 thing: "The government does not have to prove all three types  
4 of unlawful conduct in connection with the purchase or sale or  
5 securities. Any one is enough; but you must be unanimous as to  
6 which type of unlawful conduct the defendant committed." To  
7 highlight here, "if any." In the absence of "if any" here  
8 suggests that the defendant committed some type of unlawful  
9 conduct.

10 MR. MILLER: That is throughout the instructions, your  
11 Honor. I don't think that there is ambiguity, that your Honor  
12 is not suggesting that the defendant committed some type of  
13 unlawful conduct.

14 MR. SEIGEL: It refers to multiple --

15 THE COURT: OK. I will give it.

16 What else do you have?

17 MR. SEIGEL: Your Honor, when your Honor just referred  
18 to the marshal going, your Honor said that the marshal will be  
19 protecting you, protecting the jury. In this instance, we  
20 think it is inappropriate, incredibly prejudicial.

21 THE COURT: That is ridiculous, Mr. Seigel.

22 MR. SEIGEL: Let me finish. The jury is going to  
23 construe that there is some need for protection, and the need  
24 for protection certainly wouldn't be the government, it would  
25 be the defendant. That comment is essentially telegraphing --

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1 THE COURT: It is ridiculous.

2 MR. SEIGEL: I would just point out, your Honor, it is  
3 not in the written charge that your Honor gave us.

4 THE COURT: He is sworn to maintain them in privacy  
5 and custody --

6 MR. SEIGEL: That is different from protecting them.  
7 Your Honor. With that, I don't know of a curative instruction  
8 that wouldn't highlight this so at this time I am asking for a  
9 mistrial.

10 THE COURT: Asking for a mistrial? That is  
11 ridiculous. I swear the marshal right in front of the jury.

12 MR. MILLER: We object and obviously that something  
13 that every judge in this courthouse says and there is nothing  
14 prejudicial about it.

15 THE COURT: Anything else, Mr. Tacopina?

16 MR. TACOPINA: No, your Honor.

17 MR. COWLEY: Regulatory --

18 THE COURT: Page 15.

19 MR. TACOPINA: Your Honor, I think at this point it is  
20 two words in a relatively long charge --

21 THE COURT: If you want me to reread it.

22 MR. TACOPINA: No. You don't have to read it. You  
23 went over the allotted time --

24 THE COURT: It was less than two hours.

25 (Continued on next page)

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1 (In open court)

2 THE COURT: I don't have any further instructions.

3 I do have to say that with respect to two alternate  
4 jurors, Ms. Torres and Ms. Baris, only 12 jurors can  
5 deliberate, so I am going to excuse you as alternate jurors  
6 now. Notice that I say "excuse." I am not dismissing you.  
7 There may be circumstances where either one of you or both of  
8 you may have to be recalled if one of the 12 jurors becomes  
9 unexpectedly unavailable.

10 So I want to thank you for your punctuality, your  
11 faithful attendance and the close attention that you paid.

12 Please don't discuss the case with anyone. Don't read  
13 or listen to any news reports. Don't do any research until  
14 this case is over. We have your contact information, so we  
15 will keep you posted. If we need your services, we will call  
16 you back.

17 You are excused.

18 JURORS: Thank you, your Honor.

19 THE COURT: Marlon, will you please swear the marshal.

20 (Marshal sworn)

21 THE COURT: Now, you are free to deliberate. You set  
22 the schedule for your deliberations. You can deliberate as  
23 long as you want. We would ask, so that we are aware of what  
24 your schedule is, let us know by dropping us a short note after  
25 you have considered this so that we can be available here to

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1 respond to any questions you have.

2 Anything else?

3 MR. COWLEY: Not from the government, your Honor.

4 MR. TACOPINA: Not from the defense.

5 THE COURT: Thank you very much. Marlon.

6 THE DEPUTY CLERK: All rise.

7 THE COURT: We will be sending in the jury charge, the  
8 verdict sheet and the indictment promptly.

9 Are you ready with the exhibits?

10 MR. COWLEY: We will do one last check and send those  
11 in.

12 (At 4 p.m., the jury exited the courtroom to begin  
13 their deliberations)

14 (Proceedings adjourned until 9 a.m., December 18,  
15 2013)